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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. ~~214~~ 17

ALBERT A. HOEPER, APPELLANT,

vs.

TAX COMMISSION OF WISCONSIN AND MARATHON COUNTY, WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED FEBRUARY 7, 1931

(35,636)

(35,636)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 714

ALBERT A. HOEPER, APPELLANT,

vs.

TAX COMMISSION OF WISCONSIN AND MARATHON COUNTY, WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

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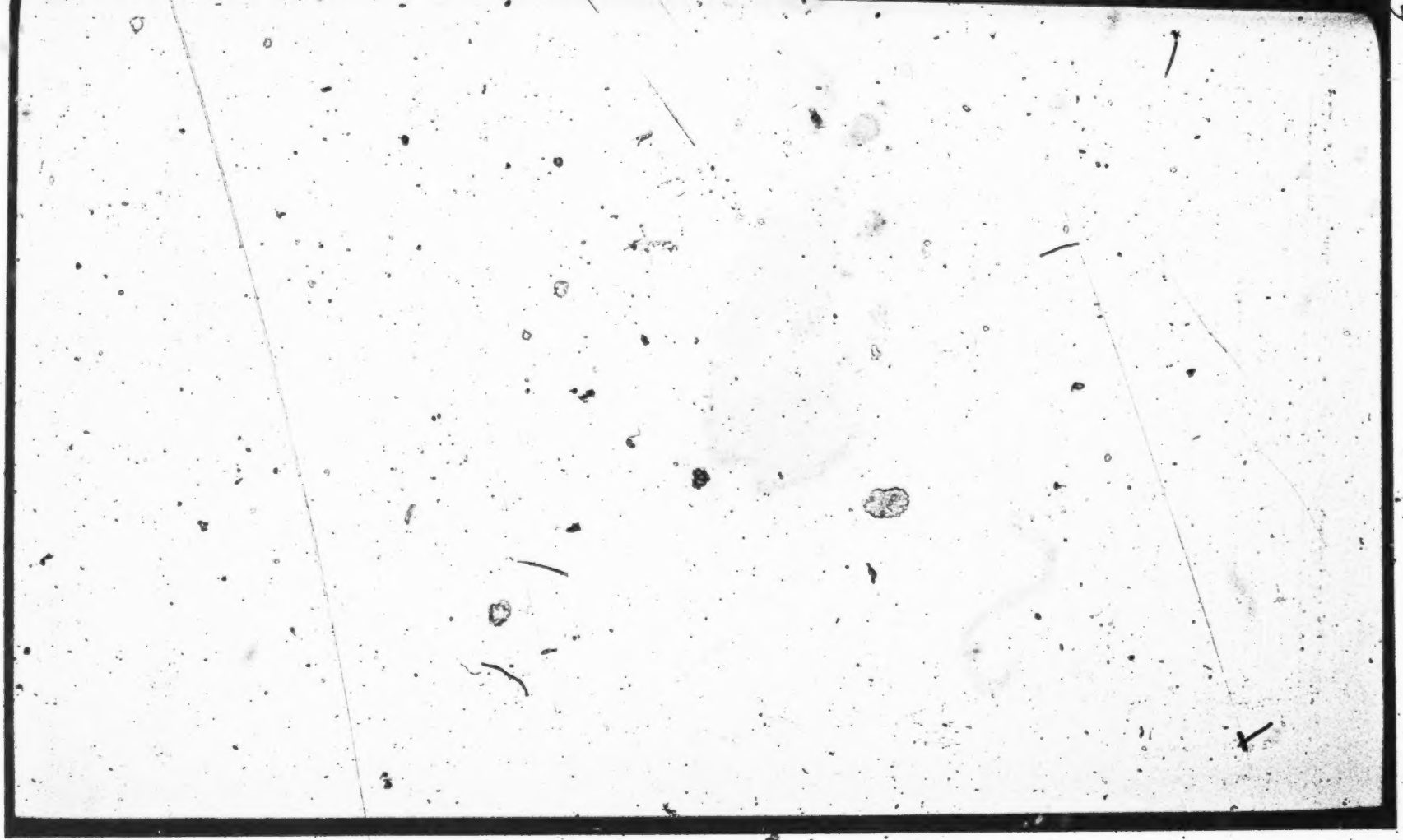

[fol. 1] Original

[File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

ALBERT A. HOEPER, Appellant,

vs.

TAX COMMISSION OF WISCONSIN and MARATHON COUNTY OF WISCONSIN, Respondents

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL—Filed Jan. 21, 1931

The above named Albert A. Hoeper, a resident of Marathon County, Wisconsin, considering himself aggrieved by the final judgment of the Supreme Court of the State of Wisconsin rendered November 11, 1930 in the above entitled cause, affirming the judgment of the Circuit Court for Marathon County, denying this appellant a portion of the recovery prayed for in his appeal to said Circuit Court, hereby prays that an appeal by this appellant be allowed to the Supreme Court of the United States herein to the end that said judgment of the Supreme Court of Wisconsin may be there reviewed and considered and justice done this appellant, and that an order be made fixing the amount of the bond required of appellant herein on such appeal.

Assignment of Errors

The said appellant assigns the following errors in the record and judgment of said Supreme Court of Wisconsin, to-wit, that said Supreme Court erred in its said decision as follows:

1. In holding that Section 71.05 (2d) of the Statutes of Wisconsin, pursuant to which a tax was levied on this appellant because of income received by his wife from her own separate estate, does not violate the Fourteenth Amendment to the Constitution of the United States.

[fols. 2 & 3] 2. In holding that Section 71.09 (4c) of the Statutes of Wisconsin, pursuant to which a tax was levied on appellant on his own income at a higher rate because his wife also had separate income from her own separate estate than is levied on other persons of like income from like sources as appellant, does not violate the Fourteenth Amendment to the Constitution of the United States.

Prayer for Reversal

For these errors said appellant prays that the judgment of the Supreme Court of the State of Wisconsin be reversed and judgment ordered granting to the appellant the relief prayed for in his appeal to the Circuit Court for Marathon County from the tax assessment complained of.

Albert A. Hoeper, Appellant. Claire B. Bird, of Bird, Smith, Okoneski & Puchner, Attorney for Appellant.

[fol. 4] Original

[File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER ALLOWING APPEAL AND APPROVING BOND—Filed Jan. 21, 1931

The above named appellant having presented and filed his petition for appeal, assignment of errors claimed, and praying for reversal of the final judgment of the Supreme Court of the State of Wisconsin, all pursuant to statute and rules of the Supreme Court of the United States in such case made and provided, and this Court being desirous that justice be done in the premises,

On motion of Claire B. Bird, attorney for appellant,

It is now here ordered that the appeal prayed for be and the same is hereby allowed in the Supreme Court of the United States from the judgment of the Supreme Court of the State of Wisconsin in the above entitled cause, as provided by law.

Further ordered that the Clerk of the Supreme Court of Wisconsin prepare and certify a transcript of the record, proceedings, opinions and judgment in the above entitled cause and transmit the same to the Supreme Court of the United States so that the same shall be in said court within thirty days from this date.

Further ordered that security for costs on such appeal is hereby fixed in the sum of Five Hundred Dollars [fols. 5 & 6] ($500.00), and the bond to that effect filed in this court is hereby approved as to form and sufficiency of sureties.

Dated at Madison, Wisconsin, this 22nd day of January, 1931.

Marvin B. Rosenberry, Chief Justice of the Supreme Court of Wisconsin. (Seal Supreme Court of Wisconsin.)

[fols. 7-15] Citation, in usual form, showing service on G. J. Boileau et al., filed Jan. 30, 1931, omitted in printing.

[fol. 16] Copy

IN CIRCUIT COURT OF MARATHON COUNTY

In the Matter of the Appeal of A. A. HOEPER and FLORENCE M. HOEPER from Assessment of Income Tax on Income of Years 1926 and 1927

A. A. HOEPER, Plaintiff and Appellant,

vs.

WISCONSIN TAX COMMISSION and MARATHON COUNTY, Defendants and Respondents

NOTICE OF APPEAL—Filed in Supreme Court April 25, 1930

To T. W. Brazeau, Special Counsel for Wisconsin Tax Commission, and G. J. Boileau, District Attorney for Marathon County:

Please take notice that the above named A. A. Hoeper, designated as plaintiff, hereby appeals to the Supreme Court of the State of Wisconsin from that portion of the judgment rendered herein on the 10th day of March, 1930, which adjudges that the assessment referred to in the proceedings herein is valid and is confirmed to the extent of $214.50 and adjudging that the said plaintiff and appellant is not entitled to recover any portion of the payment more than the excess paid above said amount.

Dated this 13th day of March, 1930.

Bird, Smith, Okoneski & Puchner, Attorneys for A. A. Hoeper, Appellant.

Admission of Service and Waiver of Bond

The undersigned hereby admits service this 14th day of March, 1930, of the above notice of appeal and hereby, expressly waive the giving of any bond or undertaking by said appellant on said appeal.

T. W. Brazeau, Special Counsel for Wis. Tax Commission; G. J. Boileau, District Attorney, for Marathon County.

[File endorsement omitted.]

[fol. 17] Clerk's certificate to transcript omitted in printing.

[fol. 18] Copy

In Circuit Court of Marathon County

In the Matter of the Appeal of A. A. Hoeper and Florence M. Hoeper from Assessment of Income Tax on Income of Years 1926 and 1927

Notice of Appeal—Filed June 26, 1929

To E. H. Kuhlmann, County Clerk for Marathon County, Assessor of Incomes for Marathon County, and Tax Commission of Wisconsin:

You are hereby notified that A. A. Hoeper and Florence M. Hoeper, his wife, do hereby each appeal to the above named Court from that particular decision of the Tax Com-

mission of Wisconsin, dated May 23, 1929, which affirmed the determination of Income Tax Board of Review for Marathon County sustaining an assessment by the Assessor of Incomes of Marathon County of $292.19 upon the appellant A. A. Hoeper because of income received by him and Florence M. Hoeper, during the years 1926 and 1927.

The objection to such assessment and confirmation thereof is that the income of each should have been assessed to each respectively and with the exemption allowed each up to October 22, 1927, the date of their marriage, and at no higher rate than if both had been single during all of said years and had so remained.

The errors assigned are that such assessment was made to Mr. Hoeper alone on the income of both instead of assessing to him only the income on his own and further is made at a higher rate and without the exemptions as above stated.

The facts upon which this appeal is based are:

A. A. Hoeper and Florence Rowley from January 1, 1926 to October 22, 1927 were both single, each having separate property and income. Each had been married before and was the head of a family during the whole period until October 22, 1927, on which date they were married.

Each make a separate return of 1927 income as well as 1926.

[fol. 19] Mr. Hoeper showed:

Income:

	1926	1927
Salary	$7,150.00	$7,150.00
Dividends and Interest	1,203.00	3,259.25
Sale of Real Estate	2,363.00	.....
	10,716.00	10,409.25
Deductions:		
Deductions and contributions	2,366.75	3,657.34
Net income	$8,349.25	$6,751.91
Amended Return deducting homestead taxes leaves Net	$6,160.68	.....

Mrs. Hoeper showed:

Income:		
Salary	$2,400.00	$2,400.00
Dividends and Interest	146.40	143.91
Partnership Distribution	1,435.04	1,519.52
	3,981.44	4,063.43
Deductions:		
Deductions and Contributions	257.12	271.73
	$3,724.32	$3,791.70

The $2,400.00 salary was received monthly. The $1,435.04 and $1,519.52 was her share of distribution above salary from an Insurance Agency business, with which Mr. Hoeper had no connection. Of the $1,519.52 in 1927, $1,417.17 was received before October 22.

The Assessor of Incomes made one assessment of $292.19 to Mr. Hoeper, computing the rate and deduction as if they had been married during the entire year. This made the tax materially more than if each had been assessed separately, either for the whole year or for the portion when they were both single. The amount of the excess is not stated in the record, but the Commission statistician can more readily compute it than can we.

On July 14, 1928 Mr. Hoeper paid this tax of $292.19 under protest.

[fol. 20] On August 2, 1928, Mr. and Mrs. Hoeper appealed to the County Board of Review and Mr. Hoeper also filed a claim for refund of the illegal excess paid. The claim for refund has never been allowed and the County Board of Review disallowed the claim entirely on appeal as did the Tax Commission on appeal to them.

All of the provisions of Sections 71.12, 71.14 and 71.15 and other precedent requirements have been duly complied with.

The propositions of law relied upon may be stated thus:

1. There is no authority in law to tax Mr. Hoeper because of Mrs. Hoeper's income either (a) received prior to their marriage, or (b) subsequent thereto.

2. R. S. 71.05 (2d) attempting to do so, only applies by its terms to income received after marriage.

3. R. S. 71.05 (2d) violates both State and Federal Constitutions.

4. R. S. 71.09 (4c) attempting to tax Mr. Hoeper at a higher rate than if he had not married violates both State and Federal Constitutions, both as to (a) his income received before marriage, and (b) his income received after marriage.

5. R. S. 71.09 (4c) attempting to levy a tax, which Mrs. Hoeper was either legally or morally required to pay, at a higher rate than if she had not married Mr. Hoeper likewise violates both State and Federal Constistutions as to her, both as to (a) her income received before marriage, and (b) her income received after marriage.

6. R. S. 71.05 (2e) does not and cannot constitutionally apply to income for the year 1926, or proportionately until October 22, 1927 to income for the year 1927.

Dated at Wausau, Wisconsin, May 27, 1929.

A. A. Hoeper and Florence M. Hoeper, by Bird, Smith, Okoneski & Puchner, Their Attorneys.

[fol. 21] CIRCUIT COURT, MARATHON COUNTY

In the Matter of the Appeal of A. A. Ho[illegible] and FLORENCE M. HOEPER from Assessment of Income Tax on Income of Years of 1926 and 1927

STATE OF WISCONSIN,
Marathon County, ss:

C. B. Bird, being duly sworn on oath says that on the 27th day of May, 1929, he duly served the foregoing notice of appeal by delivering the original thereof to the County Clerk, whose admission of service is hereon endorsed and by mailing a copy thereof to the Assessor of Incomes of Marathon County and two copies thereof to the Tax Commission of Wisconsin at Madison, Wisconsin, all in the manner required by law.

C. B. Bird.

Subscribed and sworn to before me this 27th day of May, A. D. 1929. Isabelle K. Horne, Notary Public, Marathon County, Wisconsin.

[fol. 22] [File endorsements omitted.]

[fol. 23] Copy

[File endorsement omitted]

IN CIRCUIT COURT OF MARATHON COUNTY

[Title omitted]

ANSWER—Filed Nov. 9, 1929

The above named defendant for answer in the above entitled action admits that an income assessment was made upon and against the income of the plaintiffs by the income assessor of the amount alleged, which was affirmed and sustained by the county board of review and an appeal taken therefrom to the state Tax Commission and the review of such assessment was thereafter made by the Tax Commission and said assessment affirmed and ratified and held valid by the Tax Commission; thereafter an appeal was taken by the plaintiffs from the said decision and assessment by the Tax Commission to the circuit court of said county; and thereafter a return was duly made by the Tax Commission to the said court of all documents, papers, evidence, statements and exhibits on file in the matter and all testimony taken therein, all in the manner and as provided by law.

For further answer in said case, defendant alleges that the said assessments and all said proceedings thereon were duly made in accordance with law, and that said assessments were legal, lawful and valid assessments, and made in accordance with and authorized by law and Chapter 71 of the Statutes; and defendant denies that said laws were invalid or unconstitutional, but defendant alleges that said laws and all the proceedings as taken in the making of said assessments were valid, legal and constitutional and should be sustained, approved and affirmed in this action.

[fol. 24] For further answer to said complaint, defendant

denies each and every allegation therein except as herein admitted or modified.

Wherefore defendant demands judgment denying plaintiffs relief and dismissing this action with cost.

John W. Reynolds, Attorney General; T. L. McIntosh, Assistant Attorney General; Gerald J. Boileau, District Attorney, Attorneys for Defendant, Wisconsin Tax Commission.

[fol. 25] [File endorsement omitted]

IN CIRCUIT COURT OF MARATHON COUNTY

[Title omitted]

BRIEF OF DEFENDANT—Filed Nov. 9, 1929

We submit the record shows that the proceedings in making this assessment were regular and conformed with the provisions of the statute, and that the statute is a valid and constitutional method of taxation and imposes a "personal obligation not a levy upon property," and is valid under the constitution.

State ex rel. Sallie F. Noon Co. v. Wis. Tax Comm., 166 Wis. 287.

An income tax is not levied on property, funds or profits, but on the right of an individual or corporation to receive income or profits and is a valid method of taxation.

Paine v. City of Oshkosh, 190 Wis. 69;
Income Tax Cases, 148 Wis. 456;
State ex rel. Globe Steel Tubes Co. v. Lyons, 183 Wis. 107.

Plaintiff in this case claims that under the Commission's construction of the law, her rights have been changed and she is prejudist because of her marriage to her present husband, it being her second marriage. We think the Commission's decision sufficiently explains that. Clearly under the provisions of Chapter 71, taxes are to be levied and paid by every person, and that includes corporations, associations and individuals of all kinds. In administering

the tax law like all other laws, classifications have to be made and that was done and applied here.

[fol. 26] Both the federal and state constitutions permit of just and proper classification for taxation purposes.

Kiley v. Chicago M. & St. P. R. Co., 142 Wis. 154;
Ladd v. Minneapolis St. P. & S. S. M. R. Co., 142 Wis. 165;
Borgnis v. Falk Co., 147 Wis. 327,
Income Tax Cases, 148 Wis. 456.

The necessity and propriety of classification of property then subject to taxation had to be determined by the Legislature and cannot be disturbed by the court within the rule requiring substantial distinctions between the classes.

Kiley v. Chicago, M. & St. P. R. Co., 138 Wis. 215;
Nitka v. Western Union Tel. Co., 149 Wis. 106.

It was held in the case of State ex rel. Atwood v. Johnson, 170 Wis. 218, that under the amendment to the constitution, while the uniformity clause of the constitution applies to property tax it has no application to income tax.

It is a well established rule of law that statutes are to be upheld by the courts unless they are unconstitutional beyond any reasonable doubt.

Pauly v. Keebler, 175 Wis. 428.

Without going further into an analysis of the law or the facts in this case, we cite the opinion and decision of the Tax Commission as fully covering the subject, and we think it is a proper analysis of the law as applied to the facts in this case and that decision should be affirmed and the taxes paid.

John W. Reynolds, Attorney General; T. L. McIntosh, Assistant Attorney General; Gerald J. Boileau, District Attorney, Attorneys for Defendant, Wisconsin Tax Commission.

[fol. 27] Due and personal service of the within admitted this 9th day of Nov. 1929.

Bird, Smith, O. & P. Attorneys for Plff.

[File endorsement omitted.]

[fol. 28] Copy

IN CIRCUIT COURT OF MARATHON COUNTY

In the Matter of the Appeal of A. A. HOEPER and FLORENCE M. HOEPER from the Assessment of Income Tax on Income of Years 1926 and 1927

OPINION—Filed Feb. 25, 1930

It appears that A. A. Hoeper and Florence M. Hoeper were married October 22, 1927 and previous thereto, during the year 1926 and 1927 they were each a single person and each possessing separate property and earning separate incomes. Mr. Hoeper's net income subject to taxation was in 1926, $8,349.25 and in 1927, $6,751.91, an average of $7,252.56. It also appears that Mrs. Hoeper's taxable income was in 1926, $3,724.32 and in 1927, $3,791.70, an average of $3,758.

In assessing incomes in 1928 the Assessor added the average income of Mrs. Hoeper to that of Mr. Hoeper and computed the tax upon the total, thus bringing the rates into the higher brackets and making the total tax $292.19, after making allowance for exemptions of $17.50 and adding the teachers surtax.

This is approximately $100 more than would have been assessed had the incomes been treated separately and the tax assessed to each.

The statute provided that "in computing taxes and the amount of taxes payable by persons residing together as members of a family, the income of the wife and the income of each child under 18 years of age shall be added to that of the husband or father."

The validity of this provision is questioned in this action. If this Court were free to treat this as a case of first im-
[fol. 29] pression it would be impelled to hold the provision quoted to be invalid for unwarrated and discriminatory classification.

It is sufficiently well established to make discussion unnecessary that in imposing income taxes there may be classification of tax payers but that in order to be valid there must be some proper basis for the classification; that there must be no distinction within the class, and that the classification must be consistent with natural justice and

based upon substantial distinctions which make real differences.

We have in the statute before us a separate classification of husbands and their wives and children under the age of 18 years residing together, and it is provided that their incomes shall be added together and the husband or father required to pay a tax computed on the total amount, thus bringing the tax on the income of the wife and the income of the children into the higher brackets and assessing the tax as if the entire combined incomes constituted the income of the husband and father only. The inequity of this rule seems rather apparent when applied to the income of husband and wife.

We have reached that advanced stage in the legal rights of women when the legal status of women is at least as great as to that of men, and in some particulars greater. There is no distinction between a married and an unmarried woman in respect to such legal status. The statute declares that "Women shall have the same rights and privileges under the law as men in the exercise of suffrage, freedom of contract, choice of residence for voting purposes, jury service, holding office, holding and conveying [fol. 30] property, care and custody of children, and in all other respects". (Sec. 6.015.) Her freedom of contract includes her right to make earnings separate from her husband and completely control them. She may enter into a partnership with her husband (Sparks vs. Kuss, 195 Wis. 378). She may sue her husband upon any cause of action she possesses, the same as if she were unmarried. (Wait vs. Pierce, 191 Wis. 202.) She may become a surety. (Bank vs. John, 179 Wis. 117.) And indeed there is no particular in which a married woman's husband has any right to or control over property or income or cause of action of his wife. She may convey her property without his consent, although he can not do the same as to his property.

The situation as to father and minor children is quite different. The father has the right to the earnings of the child and is legally bound to support the child, and the combining of the incomes of the two would be reasonable and would afford basis for proper classification. But it is difficult to see any such basis for uniting the incomes of husband and wife. It would not be contended that two or more brothers and sisters residing together in one family,

keeping house together but working independently and having independent incomes could be properly classified so as to combine the incomes of all and tax the oldest, for instance, or some one of the several, on the basis of the total income, thus putting the tax into the higher brackets. Yet the brothers and sisters may be not less intimate nor less closely related nor more independent of each other in prop-
[fol. 31] erty and income matters than are husband and wife.

Suppose a father or a mother has adult sons and daughters living in his or her family in the same intimate way that all families live together but the children are each employed or engaged in business separately and earning separate incomes and contributing to the household in accordance with reasonable obligations. Would any one contend that all of such members of a family might have their incomes combined for the purpose of income tax and the tax assessed upon the father or the mother on the basis of the total, thus again putting the tax into the higher brackets and imposing a penalty upon the manner of the family life?

It would seem that putting the incomes of husband and wife together in one classification, as is done, is not based upon any substantial distinction making a real and reasonable difference.

However, our Supreme Court has held in Income Tax Cases, 148 Wis. 456, 513-514, that the provision we have under consideration is valid, placing the validity of the classification upon the basis that it was necessary to prevent colorable shifts and transfers of property in order to secure double or even triple exemptions, saying that the close relationship of husband and wife makes opportunity for fraud and evasion in this manner.

True, this basis for classification has been declared insufficient in the case of Schlesinger vs. Wisconsin, 270 U. S., 228, 240. The Court there held that the necessity to prevent evasion is not a sound basis for classification and that it is not permissible to say "A may be required to submit to an
[fol. 32] exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against B. Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity."

Counsel for the State say that the Legislature may also have had in mind the fact that due to the intimate relation of husband and wife there is a joint enjoyment of the income of each which in fact is equivalent to a greater income than either would have separately. This Court can not see the difference between the relation of husband and wife and the relation of other members of a family, as we have noted.

But the ruling in the Income Tax Cases still stands and not overruled and this Court feels bound by the decision until it is changed.

Appellants also urge that there was no authority, in making the assessment in question, to combine the incomes of Mr. and Mrs. Hoeper acquired by them before their marriage in the year 1927 for the purpose of taxation of Mr. Hoeper. This Court can not escape the force of that contention, and it appears that the statute does not authorize such combination.

The Statute, Sec. 71.05 (2) (b) provided that the exemption for a husband and wife should be $17.50, and that the personal exemptions of each person should be determined by the personal status of the taxpayer on the last day of the last year included in the computation of the income. That rule fixed the exemption to which Mr. and Mrs. Hoeper were entitled at the sum of $17.50 because on the last [fol. 33] day of the year 1927 they were husband and wife.

The statute, Sec. 71.05 (2) (d) provided that "in computing taxes and the amount of taxes payable by persons residing together as members of a family, the income of the wife and the income of each child under 18 years of age shall be added to that of the husband or father".

Taking these provisions literally and also in their true meaning they in no manner authorize the adding to the income of the husband the income of one who was not his wife when the income was earned. The earnings of Florence M. before she became Mrs. Hoeper were not earnings of the wife of Mr. Hoeper. Only earnings of his wife might be added to the earnings of Mr. Hoeper, and until they were married his wife made no earnings. That would seem self evident.

It is nowhere provided that in arriving at the amount of income of a man for a given year who becomes a husband during that year, the income of one who was not his wife at

the time of earning or receiving the income should be added to his; nor does the statute declare that the status of husband and wife for the purpose of determining the total amount of income taxable to the husband shall be fixed for the whole year by the status at the end of the year. The provision in respect to status at the end of the year applies only by the very terms of the statute, to determination of the "personal exemptions". Sec. 71.05 (2) (E).

This Court can not escape the conclusion that in arriving at the income tax of Mr. Hoeper there could be included in his earnings only the earnings of his wife after she became [fol. 34] his wife, October 22, 1927.

In the year 1927, during the period before Florence M. became Mrs. Hoeper, she had earned and received of her income for the year $2,000 of salary and $1,417.17 of other income, which amounts, less deductions of $271.73, in the Court's opinion, should be deducted from her taxable income for the year of $3,791.70 and only the net balance could be legally added to the income of Mr. Hoeper for the purpose of arriving at his taxable income for the year 1927. Florence M.'s earnings for the year 1926 must be considered non-existent in so far as we are concerned with the computation of Mr. Hoeper's tax based on his income of 1927 and 1926." This method of computation makes a very material difference in the amount of the tax and the excess paid in by Mr. Hoeper should be recovered by him.

Findings may be prepared in accordance with the foregoing.

Dated February 25, 1930.

A. H. Reid, Judge.

[File endorsement omitted.]

[fol. 35] Copy

[File endorsement omitted]

In Circuit Court of Marathon County

[Title omitted]

Findings of Fact and Conclusions of Law—Filed Mar. 8, 1930

This appeal being regularly brought on for hearing upon the record as returned by the Tax Commission and issue

joined and briefs filed, and upon oral argument, Messrs. Bird, Smith, Okoneski & Puchner appearing for appellants, A. A. Hoeper and Florence M. Hoeper, and G. J. Boileau, District Attorney of Marathon County, appearing for Marathon County, and T. W. Brazeau, special counsel, appearing for the Tax Commission, and the Court, having filed a written opinion, now makes and files the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. On January 1, 1926, A. A. Hoeper was a widower, and Florence M. Rowley a widow, each the head of a family, and in income tax returns for the income of 1926 each claimed exemption as head of a family.

Each so continued until October 22, 1927, when they married, and in their return of 1927 income Mrs. Rowley, then Mrs. Hoeper, claimed exemption as head of a family, maintaining a home up to the date of said marriage.

Each made full and correct returns of income.

2. During all of said years 1926 and 1927 each of said claimants had taxable income, all of which was derived from each one's separate earnings and business, respectively, and the property of neither was received by gift, transfer or otherwise from the other, and each one's income was his or her separate income, respectively.

[fol. 36] 3. A. A. Hoeper's income subject to taxation in 1926, after deduction, was $8,349.25, and in 1927, $6,751.91.

4. Mrs. Florence M. Rowley's income subject to taxation in 1926 was $3,724.32, and in 1927, up to October 22, was $3,289.35, and from October 22, 1927 to the end of the year was $502.35, a total for 1927 of $3,791.70.

5. The Assessor of Incomes in 1928 assessed a tax upon all of said income to A. A. Hoeper in all respects as if he himself during all of both of said years owned all of said property and himself personally received all of said income, which tax so assessed amounted to $292.19.

6. A. A. Hoeper made all required protests and was compelled to, and did, pay said tax under due protest in 1928 and has complied with all the requirements for maintaining this action for the recovery of such portion thereof as may be found to be an unlawful exaction.

7. If the tax had been computed by taxing the income up to the date of marriage separately to each and the income thereafter of both to A. A. Hoeper, and allowing one exemption only and that to A. A. Hoeper, the tax, including surtax, would have amounted to $214.50 and no more. The excess of the amount collected above said amount is $77.69.

8. If the tax had been computed by assessing each one's income for all of said years severally, as if they were not husband and wife, the tax including surtax assessed to Mr. Hoeper should have been, after deducting $17.50 exemption, $158.36. The excess collected of him above said amount is $133.83.

9. The tax so assessed to Mrs. Hoeper, including surtax, would have been $52.75 less such exemption as should properly be allowed her.

[fol. 37] Conclusions of Law

1. I conclude, for reasons stated in the opinion, that the plaintiff, A. A. Hoeper, is entitled to recover the sum of $77.69, being the excess of tax collected over the amount lawfully assessable as above provided, and is not entitled to collect any more than that amount.

Let judgment be entered accordingly by the Clerk.

Dated Wausau, Wisconsin, March 8, 1930.

By the Court:

A. H. Reid, Judge.

[File endorsement omitted.]

[fols. 38 & 39] Copy

In Circuit Court of Marathon County

In the Matter of the Appeal of A. A. Hoeper and Florence M. Hoeper from the Assessment of Income Tax on Income of the Years 1926 and 1927

Judgment—Mar. 10, 1930

This appeal having duly come on for hearing, Messrs. Bird, Smith, Okoneski & Puchner appearing for the appellants, A. A. Hoeper and Florence M. Hoeper, G. J. Boilean,

District Attorney, for Marathon County, and T. W. Brazeau, Special Counsel, for the Tax Commission, and the Court having filed a written opinion and Findings of Fact and Conclusions of Law directing the entry of this judgment, now, therefore,

It is adjudged that the assessment made in 1928 to A. A. Hoeper upon income for the years 1926 and 1927 received by said A. A. Hoeper and Florence M. Rowley, who on October 22, 1927, became the wife of A. A. Hoeper, is adjudged illegal and void insofar as it assesses more than $214.50 to said A. A. Hoeper, and is ratified and confirmed to the extent of the assessment of $214.50 to said A. A. Hoeper.

Further adjudged that the said A. A. Hoeper have and recover from Marathon County the sum of $77.69, being the excess paid to the Treasurer of said county upon said assessment over and above the amount hereby adjudged lawful and valid.

Dated Wausau, Wisconsin, March 10, 1930.

By order of the Court.

H. A. Beilke, Clerk.

[File endorsement omitted.]

[fols. 40 & 41] IN SUPREME COURT OF WISCONSIN

In the Matter of the Appeal of A. A. HOEPER and FLORENCE M. HOEPER from Assessment of Income Tax on Income of Years 1926 and 1927

A. A. HOEPER, Appellant,

vs.

WISCONSIN TAX COMMISSION and MARATHON COUNTY, Respondents

Marathon Circuit Court

Opinion by Justice Wickham

JUDGMENT—Nov. 11, 1930

This cause came on to be heard on appeal from the judgment of the Circuit Court of Marathon County, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judg-

ment of the circuit court of Marathon County, in this cause, be and the same is hereby affirmed.

[fol. 42] Copy

[File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

In re Appeal of A. A. HOEPER et al. from Assessment of Income Tax

A. A. HOEPER, Plaintiff and Appellant,

v.

WISCONSIN TAX COMMISSION and MARATHON COUNTY, Defendants and Respondents

Appeal from a Judgment of the Circuit Court for Marathon County. A. H. Reid, Circuit Judge. Affirmed

The appellant, A. A. Hoeper, brought this action on May 27, 1929, to contest an assessment of income taxes based on income of 1926 and 1927, for the reason that he was assessed not only on his income but on that of his wife, Florence M. Hoeper, whom he married on October 22, 1927. The trial court, by a judgment entered March 10, 1930, held void so much of the assessment as affected income prior to October 22, 1927, but held valid the remainder of the assessment.

The commission appealed from that part of the judgment which denied the right to combine incomes prior to marriage, but this appeal has been abandoned.

OPINION—Filed Nov. 11, 1930

[fol. 43] WICKHEM, J.:

Appellant contends that sub. (2)(d) of sec. 71.05, and sub. (4)(c) of sec. 7109, Stats., are unconstitutional in that both violate the Fourteenth Amendment to the Federal Constitution, and Art. VIII, sec. 1, of the Wisconsin Constitution. Sub. (2)(d), sec. 71.05 reads as follows:

"In computing taxes and the amount of taxes payable by persons residing together as members of a family, the income of the wife and the income of each child under eighteen years of age shall be added to that of the husband or father, or if he be not living, to that of the head of the family and assessed to him except as hereinafter provided. The taxes levied shall be payable by such husband or head of the family, but if not paid by him may be enforced against any person whose income is included within the tax computation."

Sub. (4)(c), Sec. 71.09, provides:

"Married persons living together as husband and wife may make separate returns or join in a single joint return. In either case the tax shall be computed on the combined average taxable income. The exemptions provided for in subsection (2) of section 71.05 shall be allowed but once and divided equally and the amount of tax due shall be paid by each in the proportion that the average income of each bears to the combined average income."

Appellant's claim is that Art. VIII, sec. 1, Const., limits the powers to tax incomes to a levy against the recipient of the income; that a tax assessed to the husband on income of his wife is in excess of the powers granted. It is further contended that these sections violate Art. VIII, sec. 1, of the Wisconsin Constitution, and the Fourteenth Amendment to the Federal Constitution, in that they make an arbitrary and discriminatory classification as to the amount of the tax levied on persons of the same income from the same sources in the same natural class. The provisions in question were attacked in Income Tax Cases, 148 Wis. 456, 135 N. W. 164, and their validity sustained. The court said in that case:

[fol. 44] "Objection is also made to the provision that the income of a wife living with her husband shall be added to the income of the husband, and the income of each child under eighteen years of age living with its parent or parents shall be added to that of the parent or parents. This is another case of classification, and it is only justifiable in case there is some substantial difference of situation which suggests the advisability of difference of treatment. We

think there clearly is such a difference, in this, that experience has demonstrated that otherwise there will be many opportunities for fraud and evasion of the law, which the close relationship of husband and wife or parent and child makes possible, if not easy. The temptation to make colorable shifts and transfers of property in order to secure double or even triple exemptions, if there were not some provision of this kind in the law, would unquestionably be very great. There is no such temptation or opportunity in the case of the single man, or the man and wife who are living separately."

This decision has been acquiesced in for nearly twenty years, and there appears to be no reason for re-opening the question unless the decision of the United States Supreme Court in Schlesinger v. Wisconsin, 270 U. S. 228, 70 L. Ed. 557, compels a re-consideration of the matter. In the Schlesinger Case a tax was levied upon certain gifts made within six years of the death of the donor. It was found as a fact that the gifts so taxed were not made by the donor in contemplation of death. The tax was levied under the provisions of sec. 1087-1, Chap. 64ff, of the Wisconsin Statutes of 1919. In substance, this section provided for a tax on inheritance and on all gifts made in contemplation of death of the donor, or intended to take effect in possession or enjoyment at or after such death. The statute further provided:

"Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section."

[fol. 45] The court held that there was no adequate basis for a distinction between gifts made inter vivos within six years of death but in fact made without contemplation thereof, and like gifts made at other times. The court said:

"The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, "A" may be

required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against "B". Rights guaranteed by the federal constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever.

"No new doctrine was announced in Stebbins v. Riley, 268 U. S. 137, cited by defendant in error. A classification for purposes of taxation must rest on some reasonable distinction. A forbidden tax cannot be enforced in order to facilitate the collection of one properly laid. Mobile, etc. R. R. v. Turnipseed, 219 U. S. 35, 43, discusses the doctrine of presumption."

The contention of the appellant is that the Schlesinger Case has repudiated the basis upon which the decision in Income Tax Cases, supra, purports to rest, and requires that the latter case be overruled in so far as it establishes the validity of sub. (2) (d), sec. 71.05, and sub. (4) (c), sec. 71.09, Stats. To this we cannot agree. It may quite easily be admitted that an invalid tax may not be exacted of one person in order that a valid tax may effectively be collected from another, without progressing at all towards the solution of this case. The very question in this case is whether the tax is invalid, and this depends upon whether a classification, based on the marriage relation, is wholly arbitrary and unreasonable in connection with the imposition of an income tax. We cannot agree that it is. The marriage [fol. 46] relation has always been a matter of great public concern. As was said in Boehmer v. Kalk, 155 Wis. 156, 160, 144 N. W. 182:

"The marriage relation is one of the most important of those fundametal social facts or relations upon which both civilized society and government rest. The interest of the public in its preservation and in the fair and equitable enjoyment and control of property rights by the husband and wife respectively, to the end that the relation may be permanent and satisfactory, is very great. Consequently there can be no doubt of the right of the public to control and regulate both the relationship itself and the property rights of the parties to the relation, by such reasonable and ap-

propriate regulations as do not unnecessarily interfere with those rights of person and property which both state and federal constitutions were framed to protect."

The relation has always been recognized as offering peculiar opportunities for fraud and colorable transfers for the purpose of defeating creditors. It is clear that it also offers opportunities that do not exist to the same degree in the case of single persons, for shifts and transfers of property in order to secure greater exemptions from income taxes, and to avoid the higher brackets of such a tax. The relation offers special advantages to those who are in the relation, and the concern of the government to secure and protect these advantages has contributed not only to the problems of government, but to the expenditures for which taxes are levied. Those in the relation form a well-recognized social and economic unit, deriving benefits as such unit from the combined incomes of its members and in proportion to the size of this income.

In Income Tax Cases, supra, it was recognized that the advantages enjoyed by a group over individuals might [fol. 47] be the basis for a classification with respect to exemptions.

"A number of contentions are made with regard to the exemption features of the act, and, first, it is said under this head that the allowance of exemptions to individuals and the denial of them to partnerships is unjust discrimination. The question depends, of course, upon whether there is any valid ground for classification. Is there such a substantial difference between the classes as to reasonably suggest or call for the propriety of different treatment? We are clearly of opinion that this question must be answered in the affirmative. A partnership ordinarily has certain distinct and well known advantages in the transaction of business over the individual, arising from the fact that it allows a combination of capital, brains, and industry, and thus makes it possible to accomplish many things which an individual in the same business cannot accomplish." Income Tax Cases, 148 Wis. 456, 511, 135 N. W. 164.

It is of course true that there may be some families in which the husband enjoys the benefit solely from his in-

come, and the wife the benefit solely from hers. This, however, is not the usually contemplated result of the marriage, and the fact that the statute may seem to affect unfairly a few persons thus situated, has no bearing upon the reasonableness of the classification. The question with respect to classification "is not whether there may be some on one side of the line whose situation is practically the same as that of some on the other side, but whether there is a 'distinction between the classes as classes, whether there are characteristics which, in a greater degree, persist through the one class than in the other which justify legal discrimination between them.' State v. Evans, 130 Wis. 381, 110 N. W. 241." Borgnis v. Falk Co., 147 Wis. 327.

It will be noticed that both sections under examination here relate to the income of the husband and wife only when living together as husband and wife, and it is at least a permissible inference that the legislature might have had in [fols. 48-53] mind the advantages with respect to the enjoyment of the income, in enacting these sections and providing for a tax based on the aggregate income.

Taking all of the foregoing circumstances together, we cannot say that the classification is wholly arbitrary and unreasonable, or that it is not germane to the purposes of the tax.

By the Court: Judgment affirmed.

[fol. 54] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 55] IN SUPREME COURT OF THE UNITED STATES.

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed Feb. 20, 1931

Appellant, pursuant to Rule 13 (9) of this Court, herewith files this statement.

The points on which appellant intends to rely are:

1. R. S. 71.05 (2d), Statutes of Wisconsin, reading thus:

"In computing taxes and the amount of taxes payable by persons residing together as members of a family, the income of the wife and the income of each child under eighteen years of age shall be added to that of the

husband or father, or if he be not living, to that of the head of the family and assessed to him except as hereinafter provided. The taxes levied shall be payable by such husband or head of the family, but if not paid by him may be enforced against any person whose income is included within the tax computation,"

which the Supreme Court of Wisconsin held valid and authorized the tax complained of levied on appellant because of income received by Mrs. Hoeper from her own separate estate, is in law void because in violation of the Fourteenth Amendment to the Constitution of the United States.

2. R. S. 71.09 (4c), Statutes of Wisconsin, reading thus:

[fol. 56] "Married persons living together as husband and wife may make separate returns or join in a single joint return. In either case the tax shall be computed on the combined average taxable income. The exemptions provided for in subsection (2) of section 71.05 shall be allowed but once and divided equally and the amount of tax due shall be paid by each in the proportion that the average income of each bears to the combined average income,"

which the Supreme Court of Wisconsin held valid and authorized the increased rate of tax levied on appellant on his own income because of the income received by Mrs. Hoeper from her own separate estate, is in law void because in violation of the said Fourteenth Amendment.

Appellant thinks the following parts of the record are necessary for the consideration of said questions:

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Findings of Fact and Conclusions of Law of Circuit Court	35–37
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Dated at Wausau, Wisconsin, this 17th day of February, 1931.

Claire B. Bird, Attorney for Appellant.

[fol. 57] Proof of Service

Service by delivery of copy of the foregoing original statement is hereby admitted this 7th day of February, 1931.

Marathon County of Wisconsin, by Walter A. Graunke, District Attorney.

STATE OF WISCONSIN,
Marathon County, ss:

Claire B. Bird, being duly sworn, on oath, says that, as attorney for appellant, he caused the foregoing original statement to be served on the adverse parties on this 17th day of February, 1931, by mail, by then depositing in the post office at the City of Wausau, Wisconsin, two true and correct copies thereof, each separately and securely sealed, with postage fully prepaid, the one addressed "Theodore W. Brazeau, Special Counsel for Tax Commission, Wisconsin Rapids, Wisconsin", the other addressed "Attorney General of Wisconsin, Capitol Building, Madison, Wisconsin," each being the proper post office address of said addressees respectively, and that there is daily communication by mail between said City of Wausau where said deposits were made and both said Cities of Madison, Wisconsin.

Deponent further says service was also made on Walter A. Graunke, District Attorney of Respondent, Marathon County, as appears by his admission of service above.

Claire B. Bird.

Subscribed and sworn to before me this 17th day of February, 1931. R. E. Puchner, Notary Public, Marathon County, Wisconsin. My commission expires September 33, 1934. (Seal R. E. Puchner, Notary Public, Marathon County, Wis.)

[fol. 58] [File endorsement omitted.]

Endorsed on cover: File No. 35,636. Wisconsin Supreme Court. Term No. 714. Albert A. Hoeper, appellant, vs. Tax Commission of Wisconsin and Marathon County of Wisconsin. Filed February 7, 1931. File No. 35,636.

FILE COPY

No. [redacted] 17

In The

Supreme Court of the United States

October Term, 1930.

ALBERT A. HOEPER,

Appellant,

v.

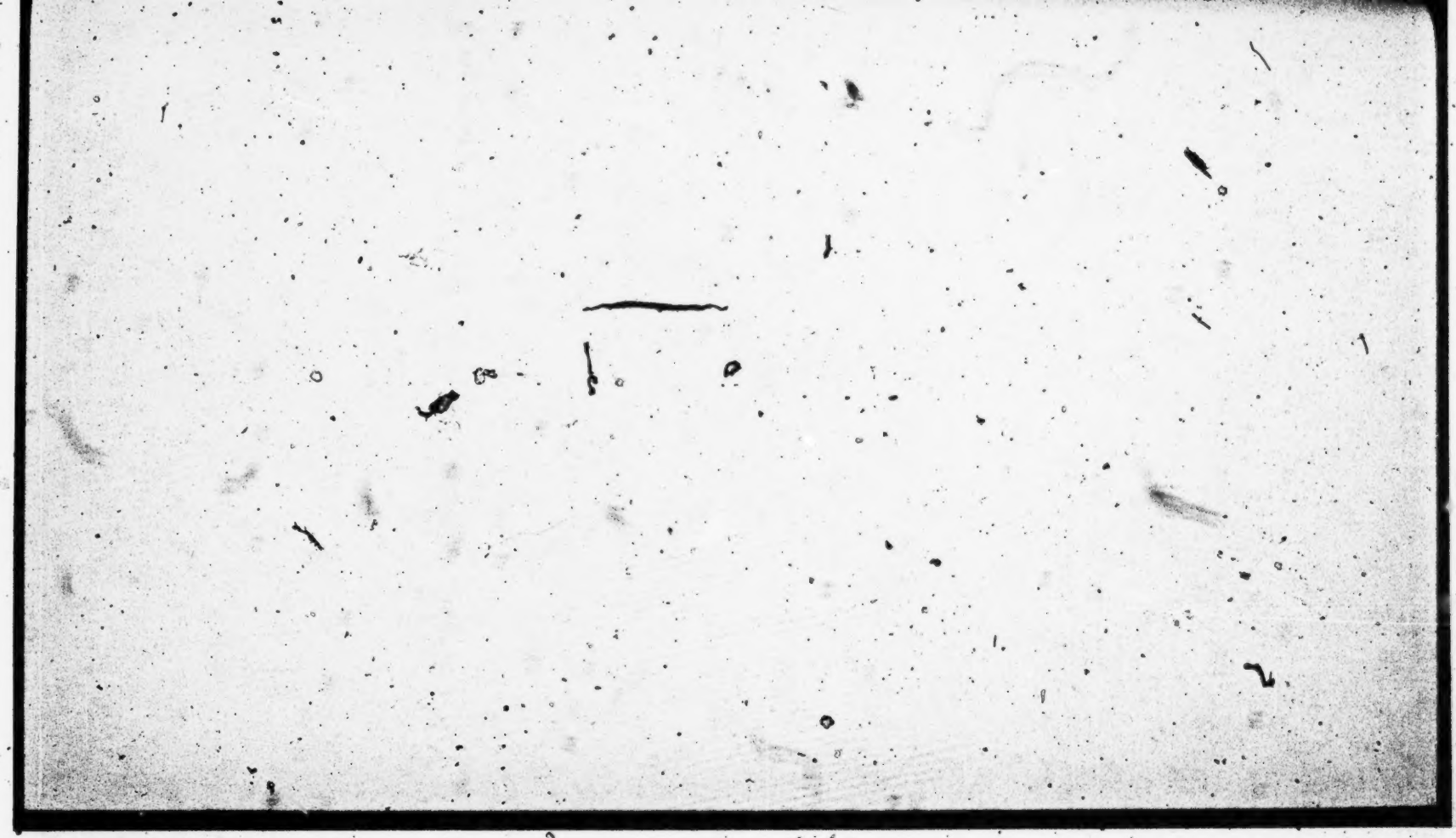
TAX COMMISSION OF WISCONSIN and MARATHON COUNTY OF WISCONSIN,

Respondents.

STATEMENT OF JURISDICTION.

CLAIRE B. BIRD,
Attorney for Appellant.

U. S. Printing Company, 2817 N. Halsted St., Chicago, Ill.



In The

Supreme Court of the United States

October Term, 1930.

ALBERT A. HORPER,

Appellant,

v.

TAX COMMISSION OF WISCONSIN and MARATHON COUNTY OF WISCONSIN,

Respondents.

STATEMENT OF JURISDICTION.

Appellant makes this statement of the basis on which he contends this Court has jurisdiction to review on this appeal the final judgment of the Supreme Court of Wisconsin.

(a) *Judicial Code, Sec. 237 (U. S. C. A., Sec. 344)*, provides:

> "A final judgment * * * in any suit in the highest court of a state in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any state, on the ground of its being

repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

(Appeal by U. S. C. A., Sec. 861a)

(b) Final judgment of the Supreme Court of Wisconsin was on November 11, 1930 (P. of R. 40).

Appeal allowed and citation issued January 22, 1931 (P. of R. 4, 5, 7); served January 24, 1931 (P. of R. 9).

(c) Appellant appealed to the Circuit Court for Marathon County, Wisconsin, (in the manner provided by Wisconsin Statutes), from the action of the Assessor of Incomes of said County in assessing, and the County in collecting, a tax against appellant of $292.19 based on the income of appellant and also that of his wife (P. of R. 18-20). The tax was on income of the years 1926 and 1927. Mr. and Mrs. Hoeper were widower and widow, respectively, until October 22, 1927, on which date they married.

The Circuit Court allowed a recovery of that portion only of the assessment which was based on the income of Mrs. Hoeper prior to October 22, 1927, when she became Mrs. Hoeper. A recovery was denied of the portion based on the income of Mrs. Hoeper after marriage, as well as of the portion assessed, both on his income and hers, at a higher rate because of the fact that both had income. See Opinion (P. of R. 28-34), Findings of Fact and Conclusions (P. of R. 35-37), and Judgment of the Circuit Court (P. of R. 38). The decision upholds the validity of, against the provisions of the *Fourteenth Amendment* of, the two statutes to be quoted, which authorize such an assessment. The Circuit Judge was of the opinion that

both statutes are valid, but that in view of the previous decisions of the Wisconsin Supreme Court, he was forced to uphold the statutes until the State Supreme Court ruled otherwise. (See Opinion, P. of R. 29-32.)

The Supreme Court of Wisconsin on appeal affirmed the judgment of the Circuit Court holding both statutes valid as against the provisions of the *Fourteenth Amendment*. (Opinion, P. of R. 42-43.)

Hence this appeal to this Court.

The statutes so held valid and which are necessary to sustain the tax and judgment are:

1. *R. S. 71.05 (2d), Statutes of Wisconsin*, reading thus:

> * * * "In computing taxes and the amount of taxes payable by persons residing together as members of a family, the income of the wife and the income of each child under eighteen years of age shall be added to that of the husband or father, or if he be not living, to that of the head of the family, and assessed to him except as hereinafter provided. The taxes levied shall be payable by such husband or head of the family, but if not paid by him may be enforced against any person whose income is included within the tax computation", and

2. *R. S. 71.09 (4c), Statutes of Wisconsin*, reading thus:

> "Married persons living together as husband and wife may make separate returns or join in a single joint return. In either case the tax shall be computed on the combined average taxable income. The exemptions provided for in *subsection (2) of section 71.05* shall be allowed but once and divided equally and the amount of tax due shall be paid by each in the proportion that the average income of each bears to the combined average income."

[illegible] validity of such statute is an

[illegible] pursuant to which this tax was [illegible] income received by his [illegible] separate estate, to which appellant [illegible] and in which he has no in- [illegible] Fourteenth Amendment to the Consti- [illegible]

[illegible] pursuant to which a tax was [illegible] at a higher rate than is applicable to [illegible] because of the fact that his [illegible] from his said separate estate, vio- [illegible] Fourteenth Amendment to the Constitution of [illegible]

[illegible] cases are believed to sustain the [illegible]

[illegible] Transit Co. v. Kentucky, 199 [illegible]

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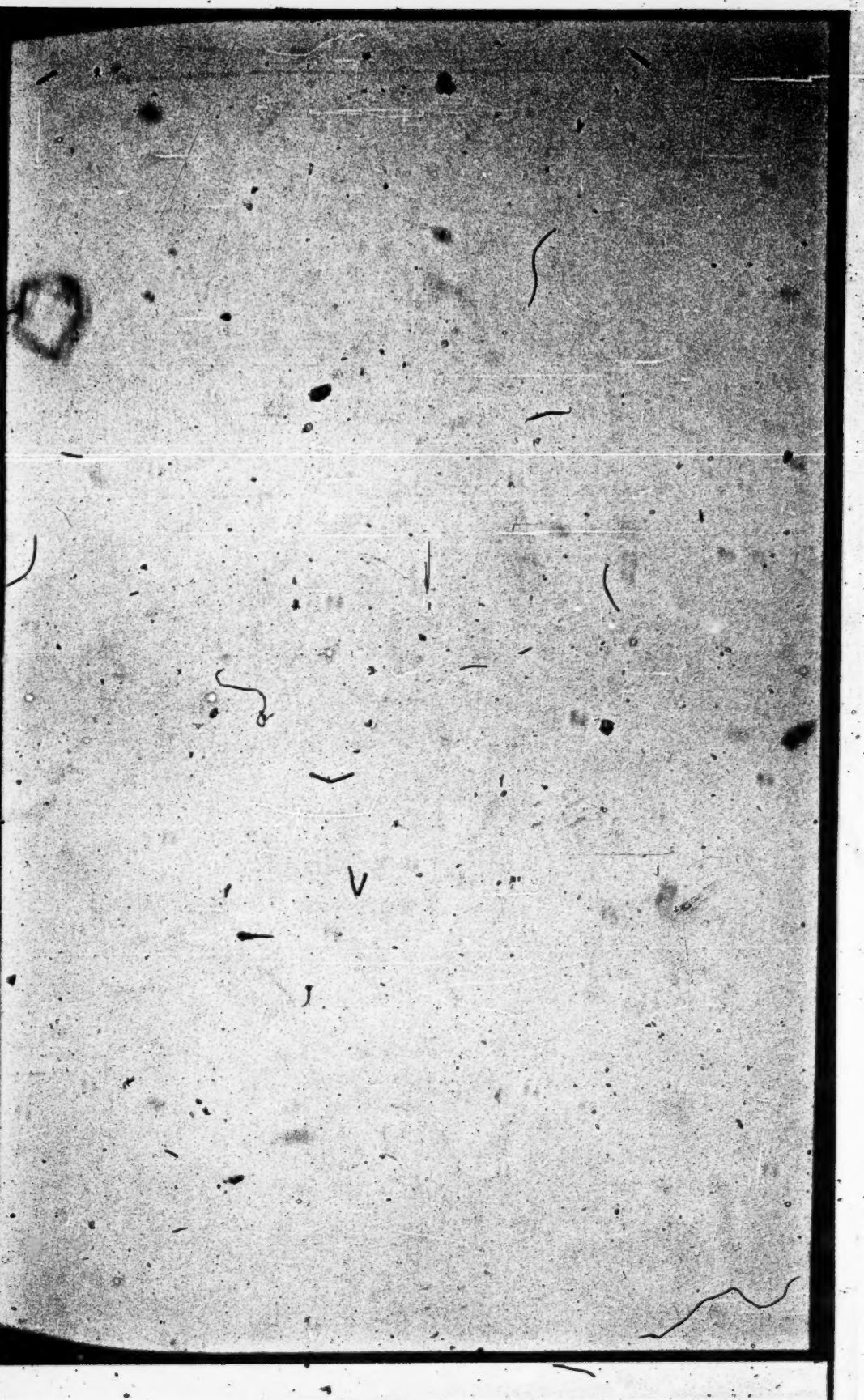
[illegible] v. Bowers, 281 U. S. 376.

[illegible] v. Burns, 75 Law. Ed. 159.

Dated February 26, 1931.

Respectfully submitted,

CLAIRE B. BIRD,
Attorney for Appellant.



FILE COPY

IN THE

Supreme Court of the United States

October 1930 Term.

No. 17

ALBERT A. HOEPER,

Appellant,

v.

TAX COMMISSION OF WISCONSIN, and MARATHON COUNTY OF WISCONSIN,

Respondents.

APPELLANT'S REPLY
To Brief of Respondent As to Jurisdiction.

CLAIRE B. BIRD,
Attorney for Appellant.

U. S. Printing Company, 2817 N. Halsted St., Chicago, Ill.

IN THE

Supreme Court of the United States

October 1930 Term.

No. 714.

ALBERT A. HOEPER, *Appellant,*

v.

TAX COMMISSION OF WISCONSIN, and MARATHON COUNTY OF WISCONSIN, *Respondents.*

APPELLANT'S REPLY

To Brief of Respondent As to Jurisdiction.

We did not attempt in our Statement of Jurisdiction to discuss the merits of the points relied on for reversal, but only the basis of the jurisdiction of the Court to hear the case. Since respondent claims the appeal is frivolous and unsubstantial, we ask the Court to receive this brief reply.

The well reasoned opinion of the able Circuit Judge that in his opinion both statutes challenged, violate the

Fourteenth Amendment (P. of R. 28-32) seems conclusive that the questions raised are substantial and should be heard by this Court on the merits.

Here a tax is imposed on appellant based upon the receipt of income of a third party over whose property, earnings or income he has no jurisdiction whatever. No more under the Wisconsin established public policy as to property and earnings of married women, than have I, or any other stranger to him and his wife. So long as appellant has no more interest or right in her property or income, than any stranger, the fact of marriage seems utterly ungermane to any taxation of that property or income. Conceded that in proper respects a classification in legislation based on marriage is valid, still it must be limited to such subject matter as is affected by the marriage relation. Property rights and earnings are expressly excluded from being at all affected by the marriage relation. Hence we claim, and ask to be heard on the claim, that to tax income or earnings of one spouse to the other, or increase the rate of one because of income of the other, is an arbitrary discrimination and based on a fact not germane at all to the income taxed.

It seems to us no reply to say, as did the Supreme Court of Wisconsin, that in most cases it is contemplated that the husband will have the benefit of the wife's income. If so, it is only as a favor, not as of right. Taxation to be valid, should be based on something more substantial than the prospect of favors. Could a child be taxed (payable out of any property he may have either in trust or guardianship) because his parents have wealth which they probably will, but are not bound to use for his benefit? We think this is injecting a novel and dan-

gerous element as a basis for tax classification. If such a Pandora's box is opened, who can foretell what will come out?

Note also that this is not a question of a difference in exemptions allowed, but instead whether the tax itself is valid. Nor is it a question of means to avoid colorable transfers (though since the *Schlesinger case, 270 U. S. 230,* that seems an insufficient basis for this tax) because admittedly in this case the property of Mrs. Hoeper was acquired before marriage, and not by gift or transfer from her husband.

We rest squarely on the doctrine of *Corliss v. Bowers, 281 U. S. 376,* that "taxation is not so much concerned with refinements of title as it is with *command over the property taxed*". (Italics ours.)

We submit that, the jurisdiction being elementary, the questions presented are substantial and call for a hearing by this Court on the merits.

Respectfully submitted,

CLAIRE B. BIRD,
Attorney for Appellant.

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SEP 15 1931
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1930.

No. [redacted] 17

ALBERT A. HOEPER,

Appellant,

v.

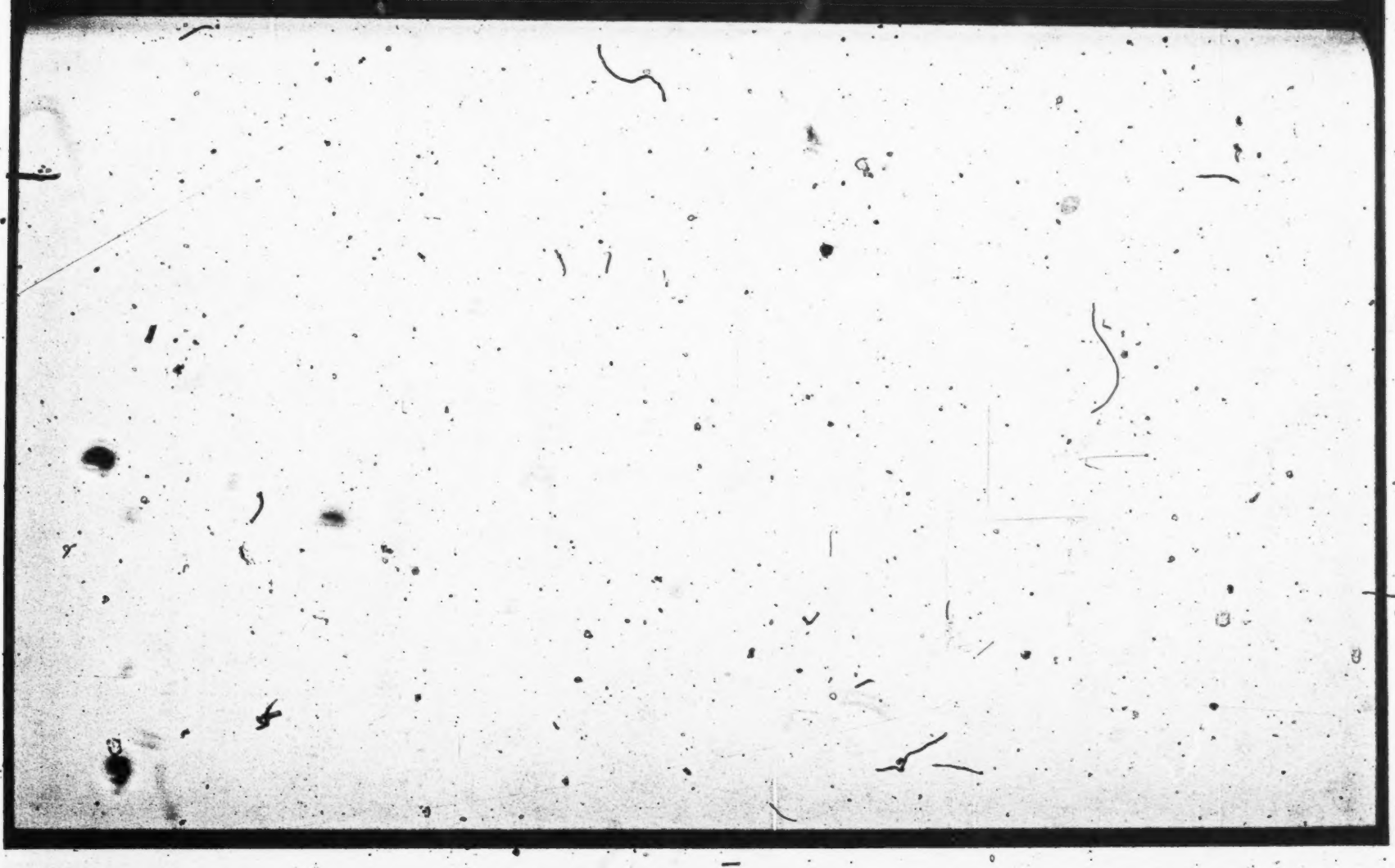
TAX COMMISSION OF WISCONSIN, and
MARATHON COUNTY, WISCONSIN,

Respondents.

BRIEF FOR APPELLANT.

CLAIRE B. BIRD,
(Of Bird, Smith, Okoneski & Puchner),
Attorney for Appellant.

U. S. Printing Company, 2817 N. Halsted St., Chicago, Ill.



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IN THE

Supreme Court of the United States

October Term, 1930.

No. 714

ALBERT A. HOEPER,

Appellant,

v.

TAX COMMISSION OF WISCONSIN, and MARATHON COUNTY, WISCONSIN,

Respondents.

BRIEF FOR APPELLANT.

This is an appeal from a judgment of the Supreme Court of Wisconsin, which held not in conflict with the Fourteenth Amendment to the Constitution of the United States two certain statutes of Wisconsin, to-wit:

(a) *R. S. 71.05 (2d)* which levies an income tax on appellant because of income received by his wife from her own separate estate.

(b) *R. S. 71.09 (4c)* which taxes appellant on his own income at a higher rate than otherwise because his wife has separate income.

(Statutes quoted at Appendix, this brief, and at page 3 of our Statement of Jurisdiction heretofore filed.)

OPINIONS OF THE COURTS BELOW.

The opinion of the Supreme Court of Wisconsin, *202 Wis. 493; 233 N. W. Rep. 100,* held both statutes valid (Transcript pp. 19-24).

The opinion of the Circuit Court held the statutes valid because of the supposed controlling force of the prior decisions of the Wisconsin Supreme Court, but held that, if free to decide independently, he would hold the statutes violated the Federal Constitution (Transcript pp. 11-14).

GROUNDS OF JURISDICTION.

As these are stated in our "Statement of Jurisdiction" heretofore filed, we assume the rule no longer requires separate statement in the brief.

The substance of the claim is that the two statutes referred to deprive appellant of his property without due process of law, and deny him the equal protection of the laws. (See Statement of Jurisdiction pp. 3, 4 and Transcript pp. 24-25.)

STATEMENT OF THE CASE.

Appellant, a widower, and Florence Rowley, a widow, (each being the head of a family and entitled to exemptions as such), married on October 22, 1927. Each had separate earnings and business, the income from both

sources being their respective separate incomes, and the property of neither was received by gift, transfer or otherwise from the other (Transcript p. 16).

Each made separate income returns for the years 1926 and 1927. These showed that in 1927 Mr. Hoeper's income was $7150.00 from salary and $3259.25 from dividends and interest, and Mrs. Hoeper's income in 1927 was $2400.00 from salary, $143.91 from dividends and interest, and $1519.52 from the distribution above salaries of an insurance agency earnings with which Mr. Hoeper had no connection (Transcript pp. 5-6).

The assessor of incomes assessed a tax on appellant of $292.19, being the tax on the total of both incomes, as if both were his own income, and exceeding by about $100.00 the *total tax on both* if assessed to each separately (Transcript p. 11). Appellant was compelled to pay this amount, which he did under protest, and, after complying with all precedent requirements, brings this action to recover the excess payment above the lawful tax on his own income (Transcript pp. 6, 16).

The Circuit Court held that the proper construction of the statutes did not authorize including in Mr. Hoeper's income that of Mrs. Hoeper before she was Mrs. Hoeper, and so allowed a recovery of $77.69; but in deference to our Supreme Court decisions, and contrary to his own view of the law, held the statutes so construed to be valid, and denied recovery of any more (Transcript p. 17). The excess recoverable, if each had been assessed separately, is $133.83 (Transcript p. 17).

So the state collected, and the judgment appealed from allowed it to retain, $56.14, part being tax on Mrs. Hoep-

er's income since the marriage and part because the combined income threw a portion of his income into a higher bracket. The amount involved is small, but is more than John Hampden's 20 shilling ship tax.

ERRORS ASSIGNED.

I. In holding that *R. S. 71.05 (2d)*[1], pursuant to which the state levied and collected from Mr. Hoeper an income tax, based solely on the separate property of Mrs. Hoeper, did not violate the Fourteenth Amendment.

II. In holding that *R. S. 71.09 (4c)*[2], pursuant to which the state levied and collected from Mr. Hoeper a tax on his own income, at a rate greater because his wife has separate property than the rate collected of others whose wives have no separate property, did not violate the Fourteenth Amendment.

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1 and 2. See Appendix.

ARGUMENT.

I. Construction of Statutes.

Whether the two statutes might have been construed as together authorizing only a collection from each spouse of that one's proportionate share of the tax is not involved. The Court held the collection of the entire tax from Mr. Hoeper was a valid exercise of taxing power. So construed, we claim it is void.

Then follows the corollary claim that a statute taxing a husband at a higher rate because his wife also has income is likewise void.

As the arguments applicable to the first statute *(71.05 (2d))* apply in principle to the second *(71.09 (4c))*, we discuss both together.

II. Nature of the Tax

It is solely a tax on the recipient of income.

Whether a tax on property, or an excise tax under the rule of

> *Brushaber v. Union P. Ry. Co., 240 U. S. 1, 14,*
> *Pollock v. Farmers Loan & Trust Co., 158 U. S. 601,*

is not important here because no question of apportionment is involved.

The Fourteenth Amendment forbids a state taking property without due process of law or denial of equal protection of the laws by any means or method whatever.

An excise or privilege tax is subject to the constitutional limitations.

Airway Electric Appliance Co. v. Day, 266 U. S. 71, 83-5,
International Paper Co. v. Mass., 246 U. S. 135, 142.

That this tax is on the recipient of the income on which the tax is based is established by the Wisconsin decisions construing the State Constitution and Income Tax Statutes:

Art. VIII, Sec. 1, Const. of Wis.
State ex rel Wickham v. Nygaard, 159 Wis. 396, 402-3.
State ex rel Manitowoc Gas Co. v. Tax Commission, 161 Wis. 111, 116.
State ex rel Moon v. Tax Commission, 166 Wis. 287, 290.

The *State Constitution* provides (the last sentence being added by an amendment in 1908):

> "The rule of taxation shall be uniform, and taxes shall be levied upon such property with such classifications as to forests and minerals, including or separate or severed from the land, as the legislature shall prescribe. Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

In *State ex rel Wickham v. Nygaard, 159 Wis. 396, 402-3*, our Court said:

> "This Constitution provided originally that taxes should be levied on property, and the matter of taxing incomes was practiced little, if at all, in America when the Constitution was adopted. • • • We construe the amendment as authorizing the legislature to

tax incomes in any case where the power rests in the state to impose such a tax."

In *State ex rel Manitowoc Gas Co. v. Tax Commission, 161 Wis. 111, 116,* the Court said:

"Our income tax is a burden laid upon the recipient of the income whether derived from real estate, personal property, or labor, the amount of which is determined by the amount of the total net income derived from these sources, singly or combined. It is a toll taken from the fruits of property and labor in proportion to the net value of the harvest. Such toll is property, and so is the fruit of property and labor."

In *State ex rel Moon v. Tax Commission, 166 Wis. 287, 290,* the Court said.

"Much confusion of thought arises from regarding the income tax as a tax that is levied upon or attaches to property as such, irrespective of the person sought to be taxed. It is the recipient of the income that is taxed, not his property—and the vital question in each case is, Has the person sought to be taxed received an income during the tax year? If so, such income, unless specifically exempted, is subject to a tax though the property out of which it is paid may have been exempt from an income tax in the hands of the payor. It is the relation that exists between the person sought to be taxed and the specific property claimed as income to him that determines whether there shall be a tax. If the person sought to be taxed is the recipient during the tax year of such specific property as income in its ordinary significance, then the person is taxed. But the tax is upon the right or ability to produce, create, receive, and enjoy, and not upon specific property. Hence, the amount of the tax is measured by the amount of the income irrespective of the amount of specific property or ability necessary to produce or create it. In

the ordinary acceptation of the term this may be said to be a tax upon income as the statute denominates it. But the tax does not seek to reach property or an interest in property as such. It is a burden laid upon the recipient of an income."

This Court gives the same definition of an income tax in *Willcuts v. Bunn, 75 L. Ed. 159,* thus:

"The tax upon interest is levied upon the return which comes to the owner of the security according to the provisions of the obligation and without any further transaction on his part. The tax falls upon the owner by virtue of the mere fact of ownership, regardless of use or disposition of the security."

III. In Wisconsin, a Husband Has No Interest In Or Control Over His Wife's Property, Earnings Or Income.

Chapter 246 of the Statutes of Wisconsin, entitled "Property Rights of Married Women", removes every common law right of the husband in property or income of the wife. We quote the following sections:

"*R. S. 246.01. Realty of.* The real estate of every description, including all held in joint tenancy with her husband, and the rents, issues and profits thereof of any female now married shall not be subject to the disposal of her husband, but shall be her sole and separate property as if she were unmarried."

"*246.02. Estate of, not subject to husband.* The real and personal property of any female who may hereafter marry and which she shall own at the time of marriage and the rents, issues and profits thereof shall not be subject to the disposal of her husband nor be liable for his debts and shall continue her sole and separate property."

"*246.03. May receive, hold and convey property.* Any married female may receive by inheritance or by gift, grant, devise or bequest from any person, hold to her sole and separate use, convey and devise real

and personal property and any interest or estate therein of any description, including all held in joint tenancy with her husband, and the rents, issues and profits thereof in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband nor be liable for his debts. Any conveyance, transfer or lien executed by either husband or wife to or in favor of the other shall be valid to the same extent as between other persons."

"*246.05. Individual earnings.* The individual earnings of every married woman, except those accruing from labor performed for her husband, or in his employ or payable by him, shall be her separate property and shall not be subject to her husband's control or liable for his debts."

"*246.07. May sue in her own name.* Every married woman may sue in her own name and shall have all the remedies of an unmarried woman in regard to her separate property or business and to recover the earnings secured to her by *sections 246.05* and *246.06*, and shall be liable to be sued in respect to her separate property or business, and judgment may be rendered against her and be enforced against her and her separate property in all respects as if she were unmarried." * * *

R. S. 6.015 (1), (enacted in 1921), also provides:

"*Women to have equal rights.* (1) Women shall have the same rights and privileges under the law as men in the exercise of suffrage, freedom of contract, choice of residence for voting purposes, jury service, holding office, holding and conveying property, care and custody of children, and in all other respects. The various courts, executive and administrative officers shall construe the statutes where the masculine gender is used to include the feminine gender unless such construction will deny to females the special protection and privileges which they now en-

joy for the general welfare. The courts, executive and administrative officers shall make all necessary rules and provisions to carry out the intent and purposes of this statute."

No claim can be or will be made, we believe, that as to her property, earnings or unearned income, a husband has any right whatever, any more than any stranger has. We need not refer to such decisions in detail. Sufficient to quote as an accurate statement of the law of Wisconsin the following from the opinion of Judge A. H. Reid, the learned and revered trial Judge, to-wit:

"We have reached that advanced stage in the legal rights of women when the legal status of women is at least as great as that of men, and in some particulars greater. There is no distinction between a married and an unmarried woman in respect to such legal status. The statute declares that 'Women shall have the same rights and privileges under the law as men in the exercise of suffrage, freedom of contract, choice of residence for voting purposes, jury service, holding office, holding and conveying (fol. 30) property, care and custody of children, and in all other respects.' *(Sec. 6.015).* Her freedom of contract includes her right to make earnings separate from her husband and completely control them. She may enter into a partnership with her husband *(Sparks v. Kuss, 195 Wis. 378).* She may sue her husband upon any cause of action she possesses, the same as if she were unmarried. *(Wait v. Pierce, 191 Wis. 202.)* She may become a surety. *(Bank v. John, 179 Wis. 117.)* And indeed there is no particular in which a married woman's husband has any right to or control over property or income or cause of action of his wife. She may convey her property without his consent, although he cannot do the same as to his property."

The construction of the state courts will be followed in determining to whom income from community property is assessable.

U. S. v. Robbins, 269 U. S. 315, 326-7.

IV. R. S. 71.05 (2d), Which Authorized Collection of a Tax from Mr. Hoeper Solely Because His Wife Had Separate Income from a Separate Estate, Took His Property "Without Due Process of Law".

(a) Limitations on the power of taxation.

We recognize the great latitude a state has in selecting subjects and persons for taxation. This latitude does not permit taking of property by taxation, unless there be

> "an equivalent rendered to the taxpayer in the protection of his person and property".
>
> *Union Transit Co. v. Kentucky, 199 U. S. 194, 202.*

So in holding void a statute permitting non-taxable Government bonds to be included in the valuation of bank assets in fixing value of its stock for taxation, this Court said:

> "When this* is read the doubt instantly arises whether the law intended to tax the corporation for property which it does not own, but which on the contrary is owned by the stockholders. Certainly such a purpose, against common justice and of doubtful constitutionality, ought not to be attributed to the law if any other fair construction is possible. With respect to taxation usually, if not necessarily, property and its owners are inseparable. Taxes are assessed against persons upon the property which they own, not upon property which others own. We should

* Refers to the following language in the statute: "Assessed to said banks, * * * not to the individual stockholders."

be reluctant to suppose that there has been any departure from this principle in this law."

Home Savings Bank v. Des Moines, 205 U. S. 503, 510.

So it is held that a tax imposed upon a resident of the taxing state because of ownership of property in another state is a taking of property without due process of law and void.

Union Transit Co. v. Kentucky, supra.

A. T. & S. F. Ry. Co. v. O'Connor, 223 U. S. 280, 285.

Western Union Tel. Co. v. Kansas, 216 U. S. 1, 38.

Pullman Co. v. Kansas, 216 U. S. 56, 62.

State Tax on Foreign Held Bonds, 15 Wall. 300.

The state may consider property beyond its borders, and hence not taxable by it, in fixing the measure of a tax on property within the state.

Maxwell v. Bugbee, 250 U. S. 525.

K. C. M. & B. Ry. Co. v. Stiles, 242 U. S. 111.

But if in so doing it imposes a tax on a valuation beyond the intra-state proportionate share of the total valuation, the tax is without due process of law and void.

Wallace v. Hines, 253 U. S. 66, 69-70.

And the tax is likewise void if, in assessing the intra-state intangibles, the value of extra-state intangibles is included.

Southern Ry. Co. v. Kentucky, 274 U. S. 76.

In holding that membership in a Chamber of Commerce might be taxed by a state, the turning point was:

"It is not to be doubted—giving full effect to all the allegations of the complaint—that the memberships despite the restrictions of the rules were property."

Rogers v. Hennepin County, 240 U. S. 184, 189.

(b) An income tax may be levied only on the owner or legal beneficiary of the income.

Corliss v. Bowers, 281 U. S. 376, assumes such limitation as to income tax. In reply to the claim that since the plaintiff had placed the property in a trust, the income was not taxable to him, the Court, because of his reserved control, said:

"But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid. If a man directed his bank to pay over income as received to a servant or friend, until further orders, no one would doubt that he could be taxed upon the amounts so paid. It is answered that in that case he would have a title, whereas here he did not. But from the point of view of taxation there would be no difference. The title would merely mean a right to stop the payment before it took place. The same right existed here although it is not called a title but is called a power. * * * The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not."

This is followed, in *Poe v. Sanborn, 75 Law Ed. 27,* where it is held that in community states a wife may file a separate return of her income because, as distinguished from the *Corliss case,* "the husband never had ownership" of that income. See also:

U. S. v. Robbins, 269 U. S. 315, 326-7,
Old Colony Trust Co. v. Comm., 279 U. S. 716.

V. No Classification Can Make Appellant Liable for the Tax on This Income of Mrs. Hoeper.

(a) Classification deals with discrimination, not fundamental liabilities.

If propositions III and IV are true, the above conclusion would seem to follow. Classification has to do with questions of discrimination, not of fundamental liability for the subject matter. If the subject matter is taxable to a given person, then the "equal protection of the laws" clause of the Fourteenth Amendment protects him against discrimination by classification. But if the subject matter is not taxable at all to the person in question, then such taxation is the taking of property "without due process of law". In that case we submit that classification cannot validate. A valid tax may be made void by discriminatory classification. A void tax cannot be validated by classification.

Is, then, the reasoning of the Wisconsin Supreme Court that marriage authorizes this tax sound?

(b) Position of Wisconsin Supreme Court Stated.

That Court says:

> "It may quite easily be admitted that an invalid tax may not be exacted of one person in order that a valid tax may effectively be collected from another, without progressing at all towards the solution of this case. The very question in this case is whether the tax is invalid, and this depends upon whether a classification, based on the marriage relation, is wholly arbitrary and unreasonable in connection with the imposition of an income tax. We cannot agree that it is. The marriage relation has always been a matter of great public concern. As was said in *Boehmer v. Kalk, 155 Wis. 156, 160; 144 N. W. 182:*

'The marriage relation is one of the most important of those fundamental social facts or relations upon which both civilized society and government rest. The interest of the public in its preservation and in the fair and equitable enjoyment and control of property rights by the husband and wife respectively, to the end that the relation may be permanent and satisfactory, is very great. Consequently there can be no doubt of the right of the public to control and regulate both the relationship itself and the property rights of the parties to the relation, by such reasonable and appropriate regulations as do not unnecessarily interfere with those rights of persons and property which both state and federal constitutions were framed to protect.'

"The relation has always been recognized as offering peculiar opportunities for fraud and colorable transfers for the purpose of defeating creditors. It is clear that it also offers opportunities that do not exist to the same degree in the case of single persons, for shifts and transfers of property in order to secure greater exemptions from income taxes, and to avoid the higher brackets of such a tax. The relation offers special advantages to those who are in the relation, and the concern of the government to secure and protect these advantages has contributed not only to the problems of government, but to the expenditures for which taxes are levied. Those in the relation form a well-recognized social and economic unit, deriving benefits as such unit from the combined incomes of its members and in proportion to the size of this income. • • •

"It is of course true that there may be some families in which the husband enjoys the benefit solely from his income, and the wife the benefit solely from hers. This, however, is not the usually contemplated result of the marriage, and the fact that the statute may seem to affect unfairly a few persons thus situated, has no bearing upon the reasonableness of the classification. • • •

"It will be noticed that both sections under examination here relate to the income of the husband and wife only when living together as husband and wife, and it is at least a permissible inference that the legislature might have had in mind the advantages with respect to the enjoyment of the income, in enacting these sections and providing for a tax based on the aggregate income.

"Taking all of the foregoing circumstances together, we cannot say that the classification is wholly arbitrary and unreasonable, or that it is not germane to the purposes of the tax."

Is this reasoning sound?

(c) The claim of opportunities for fraud and colorable transfers cannot avail to validate this tax.

On the undisputed facts, this income of Mrs. Hoeper was not from any property in which her husband ever had any interest. It was what the law of Wisconsin assures to her, "her own separate earnings and estate".

So the rule of *Schlesinger v. Wisconsin, 270 U. S. 228, 240,* seems to bar any such consideration as a basis for classification. The language of that case seems to fit exactly this claim of the state:

"The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B'. Rights guaranteed by the federal constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

The State having declared the legal rights to be financial separation, it then taxes on the basis of the old repealed doctrine of financial unity merely as our Court said to avoid "evasion", declared by this Court to be no legal reason. Applying the Schlesinger ruling to the opinion of the Wisconsin Supreme Court leaves this a tax on financial unity where there is no financial unity.

(d) Under the Laws of Wisconsin, marriage affects only the social, and not at all the financial, status of the parties.

By particular and definite declarations of policy and property rights, the State has wiped out every vestige of the old common law unity as to property rights. The union is a social, not a financial unity. Whether this policy of financial independence will tend in time to weaken the social interdependence and unity is a sociological problem which does not concern us here. For weal or woe, financial separation is established as the fundamental policy of the State. That policy as established by our statutes fixes the property rights of Mrs. Hoeper and bars him from any right to or interest in her property or income.

(e) A tax law based on property, which taxes one because of property rights of another with whom he has social but no financial relations, makes an arbitrary and unreasonable classification, having no relation to the subject matter of the tax law, and is void.

As stated under (a), it seems to us no question of classification arises because taxing one for income of another is a taking of property without due process of law. But as we claim the statute also denies appellant the equal protection of the laws, we come to the above point.

That a classification to be valid must be, (a), based on substantial distinctions which make a real difference, (b) consistent with natural justice, (c) reasonable and not arbitrary, (d) germane to the purpose of the law, and (e) not discriminatory within the class, is all elementary and calls for no listing of citations.

> "'In determining what is within the range of discretion and what is arbitrary, regard must be had to the particular subject of the state's action."
>
> *Smith v. Cahoon, 75 Law. Ed. 813, 819.*

The classification must be based on something "having relation to the purpose for which it is made".

Airway Elec. App. Corp. v. Day, 266 U. S. 71, 85.
So. Ry. Co. v. Greene, 216 U. S. 400, 417.

The purpose of the Income Tax Law is to raise moneys for the general purposes of government by a tax on the recipient of incomes. Granted that reasonable exemptions and graduated rates are permissible. Here we have a distinction based solely on social relations.

A married man of the same income as Mr. Hoeper is taxed less, if his wife has no property of her own, than is Mr. Hoeper. Yet Mr. Hoeper has no right to or interest in any portion of Mrs. Hoeper's property. He has the same legal duty of support as has the other man. Mrs. Hoeper's income cannot legally be called upon to aid in any of his legal duties.

He is entitled to a child's earnings; hence the child's income may (at least to the extent of its earnings) properly be added to his. Not so as to the wife's income.

A partnership may, no doubt, be taxed to the unity. There is a unity of financial interests. The law makes the

fact of partnership a unity of liability. If, however, a tax statute in taxing a partnership should attempt to impose the total liability on one partner, a different question might arise.

Here is a classification based on facts entirely foreign to the income of the several taxpayers. It does not seem at all germane to a tax law based on the ownership of property or receipt of income.

Whether a state might lawfully tax the privilege of marriage is beside the question here. That is not the purpose or purport of the Income Tax Law. Since contracts in restraint of marriage are void as against public policy, we need not convict the state legislature of any such purpose.

Why say that the "usually contemplated result of the marriage" is a sharing of incomes? We conceive the usually contemplated result is a union pursuant to, and in mutual recognition of, the respective legal rights and obligations annexed to the contract of marriage.

The husband may legally, if this law is valid, be taxed more than his entire income in some cases to pay the levy on his wife's income, while he has no claim to or interest in that income. Is that a reasonable classification? Is it not arbitrarily based on an extraneous fact? If we postulate that she may probably use her income for his benefit, have we not injected a novel and dangerous element into the law of tax classification? May one be lawfully taxed because of a prospect that he may receive a favor, rather than because of his legal rights? If so, then a child may lawfully be taxed, and collection enforced out of its own legal estate, because it has wealthy par-

ents who probably will lavish their wealth on it. Or go one step farther—collateral relatives may show a like disposition toward a child of their fancy. As we heretofore stated (Reply as to Jurisdiction, p. 3), "If such a Pandora's box is opened, who can foretell what will come out?".

Improbable that any such tax will be attempted? Maybe so; but where is the line to be drawn? Only, we say, at legal rights and duties. There is a clear and easily defined line of limitation. Pass beyond that, and no other clear limitation can be found.

We have caused search to be made of statutes of other states and find none like or similar in principle to these Wisconsin statutes. Others usually follow the Federal Statutes which *permit* spouses to make either joint or separate returns and impose no greater liability than the separate returns show, unless the taxpayers elect otherwise.

VI. R. S. 71.05 (2d) Also Denies Appellant the Equal Protection of the Laws.

This is simply a question of classification. We have discussed that question under V and nothing more need be added here.

VII. R. S. 71.09 (4c), Pursuant to Which the State Levied and Collected From Mr. Hoeper a Tax on His Own Income at a Rate Greater Than Collected of Others of Like Income, Also Violates the Fourteenth Amendment.

We see no need of separate discussion under this head. If the State may tax a husband because of separate estate

and income of his wife, it may impose an increased rate on him on his own income for the same reason. If, on the other hand, the Fourteenth Amendment prohibits taxing him on his wife's income, the same reasoning prohibits increasing his own tax for that reason. The excess added to his proper tax is a tax on him solely because of his wife's income. It is a difference in amount or degree only, not a difference in principle.

We submit that the judgment of the Supreme Court of Wisconsin should be reversed.

CLAIRE B. BIRD,
(Of Bird, Smith, Okoneski & Puchner),
Attorney for Appellant.

APPENDIX.

R. S. 71.05 (2d), Statutes of Wisconsin:

• • • "In computing taxes and the amount of taxes payable by persons residing together as members of a family, the income of the wife and the income of each child under eighteen years of age shall be added to that of the husband or father, or if he be not living, to that of the head of the family and assessed to him except as hereinafter provided. The taxes levied shall be payable by such husband or head of the family, but if not paid by him may be enforced against any person whose income is included within the tax computation."

R. S. 71.09 (4c), Statutes of Wisconsin:

"Married persons living together as husband and wife may make separate returns or join in a single joint return. In either case the tax shall be computed on the combined average taxable income. The exemptions provided for in *subsection (2) of section 71.05* shall be allowed but once and divided equally and the amount of tax due shall be paid by each in the proportion that the average income of each bears to the combined average income."

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 17

ALBERT A. HOEPER,

Appellant,

vs.

TAX COMMISSION OF WISCONSIN AND MARATHON COUNTY OF WISCONSIN,

Respondents.

BRIEF OF RESPONDENT TAX COMMISSION OF WISCONSIN AS TO JURISDICTION OF THE SUPREME COURT OF UNITED STATES ON APPEAL

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

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HAROLD M. WILKIE,
Special Counsel for Respondent,
Tax Commission of Wisconsin.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 714

ALBERT A. HOEPER,

Appellant,

vs.

TAX COMMISSION OF WISCONSIN AND MARATHON COUNTY OF WISCONSIN,

Respondents.

BRIEF OF RESPONDENT TAX COMMISSION OF WISCONSIN AS TO JURISDICTION OF THE SUPREME COURT OF UNITED STATES ON APPEAL

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

Respondent Tax Commission of Wisconsin claims that the Supreme Court of the United States should not take jurisdiction of this appeal from the Supreme Court of Wisconsin for two reasons:

I. Appellant's claim that the part of the State Income Tax Statute in question is repugnant to the Fourteenth

Amendment to the Constitution of the United States is frivolous and without substance.

II. The cases relied upon by Appellant do not sustain the alleged jurisdiction of The Supreme Court of the United States in this case.

ARGUMENT

I

APPELLANTS CLAIM THAT STATE STATUTE IS REPUGNANT TO FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IS FRIVOLOUS AND WITHOUT SUBSTANCE.

The part of the Wisconsin Income Tax Statute here in question has been twice sustained by the Supreme Court of Wisconsin against the claim that it was repugnant to the Fourteenth Amendment to the Federal Constitution.

The statute was first sustained in The Income Tax Cases, (1912) 148 Wis. 456, 513; 134 N. W. 673, 691; 135 N. W. 164, which sustained the constitutionality of the Wisconsin Income Tax Law.

> "Objection is also made to the provision that the income of a wife living with her husband shall be added to the income of the husband, and the income of each child under eighteen years of age living with its parent or parents shall be added to that of the parent or parents. This is another case of classification, and it is only justifiable in case there is some substantial difference of situation which suggests the advisability of difference of treatment. We think there clearly is such a difference, in this, that experience has demonstrated that otherwise there will be many opportunities for fraud and evasion of the law, which the close relationship of husband and wife or

parent and child makes possible, if not easy. The temptation to make colorable shifts and transfers of property in order to secure double or even triple exemptions, if there were not some provision of this kind in the law, would unquestionably be very great. There is no such temptation or opportunity in the case of the single man, or the man and wife who are living separately."

This decision was followed by the Supreme Court of Wisconsin, in the present case, decided November 11, 1930, 233 N. W. 100, after the law as established in the Income Tax Cases had been acquiesced in for nearly twenty years. There is no reason to reopen the question unless the decision of this court in Schlesinger v. Wisconsin, 270 U. S. 230, compels a reconsideration of the matter. That question was carefully considered by the Supreme Court of Wisconsin in the decision in the present case. (233 N. W. at page 102)

"The contention of the appellant is that the Schlesinger Case has repudiated the basis upon which the decision in Income Tax Cases, supra, purports to rest, and requires that the latter case be overruled in so far as it establishes the validity of subdivision (2) (d), §71.05 and subdivision (4) (c), §71.09 Stats. To this we cannot agree. It may quite easily be admitted that an invalid tax may not be exacted of one person in order that a valid tax may effectively be collected from another, without progressing at all towards the solution of this case. The very question in this case is whether the tax is invalid, and this depends upon whether a classification, based on the marriage relation, is wholly arbitrary and unreasonable in connection with the imposition of an income tax. We cannot agree that it is. The marriage relation has always been a matter of great public concern. As was said in *Boehmer v. Kalk*, 155 Wis. 156, 160, 144 N. W. 182, 183, 49 L. R. A. (N. S.) 487:

'The marriage relation is one of the most important of those fundamental social facts or relations upon which both civilized society and government rest. The interest of the public in its preservation and in the fair and equitable enjoyment and control of property rights by the husband and wife respectively, to the end that the relation may be permanent and satisfactory is very great; consequently there can be no doubt of the right of the public to control and regulate both the relationship itself and the property rights of the parties to the relation by such reasonable and appropriate regulations as do not unnecessarily interfere with those rights of person and property which both state and federal constitutions were framed to protect.'

The relation has always been recognized as offering peculiar opportunities for fraud and colorable transfers for the purpose of defeating creditors. It is clear that it also offers opportunities that do not exist to the same degree in the case of single persons, for shifts and transfers of property in order to secure greater exemptions from income taxes, and to avoid the higher brackets of such a tax. The relation offers special advantages to those who are in the relation, and the concern of the government to secure and protect these advantages has contributed not only to the problems of government, but to the expenditures for which taxes are levied. Those in the relation form a well-recognised social and economic unit, deriving benefits as such unit from the combined incomes of its members and in proportion to the size of this income.

In Income Tax Cases, supra, it was recognized that the advantages enjoyed by a group over individuals might be the basis for a classification with respect to exemptions.

'A number of contentions are made with regard to the exemption features of the act, and, first, it is said under this head that the allowance of exemptions to individuals and the denial of them to partnerships is unjust discrimination. The question depends, of

course, upon whether there is any valid ground for classification. Is there such a substantial difference between the classes as to reasonably suggest or call for the propriety of different treatment? We are clearly of opinion that this question must be answered in the affirmative. A partnership ordinarily has certain distinct and well known advantages in the transaction of business over the individual, arising from the fact that it allows a combination of capital, brains, and industry, and thus makes it possible to accomplish many things which an individual in the same business cannot accomplish.' Income Tax Cases, 148 Wis. 456, 511, 134 N. W. 673, 690, 135 N. W. 164.

It is of course true that there may be some families in which the husband enjoys the benefit solely from his income, and the wife the benefit solely from hers. This, however, is not the usually contemplated result of the marriage, and the fact that the statute may seem to affect unfairly a few persons thus situated has no bearing upon the reasonableness of the classification. The question with respect to classification 'is not whether there may be some on one side of the line whose situation is practically the same as that of some on the other side, but whether there is a distinction between the classes as classes, whether there are characteristics which, in a greater degree, persist through the one class than in the other which justify legal discrimination between them.' *State v. Evans*, 130 Wis. 381, 110 N. W. 241.' *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 218, 37 L. R. A. (N. S.) 489.

It will be noted that both sections under examination here relate to the income of the husband and wife only when living together as husband and wife, and it is at least a permissible inference that the Legislature might have had in mind the advantages with respect to the enjoyment of the income, in enacting these sections and providing for a tax based on the aggregate income."

The above, it seems to us, shows so clearly that there was at least some reasonable basis for the classification in

question that any contention that the statute violates the 14th amendment is frivolous and without substance.

It is purely a matter of state policy whether the common law rule of unity of husband and wife be preserved or if modified, to what extent it should be modified. This is purely a question of state law. Whether the present law be regarded as retaining the common law rule of unity of husband and wife for the purpose of measuring the rate of income tax or it be regarded simply as making a tax classification based on a real difference in ability to pay, it is apparent that a real substantial ground exists for the classification and therefore there is no substantial Federal question involved.

Quong Wing, v. Kirkendall, 223 U. S. 59 at 62.

Any classification is permissible which has a reasonable relation to some permitted end of governmental action. It is enough if the classification is reasonably founded in the purpose and policy of taxation.

Heisler v. Thomas Colliery Co., 260 U. S. 245, 255.
Watson v. State Comptroller, 254 U. S. 122.
Bells Gap R. R. Co. v. Pennsylvania, 134 U. S. 232.

II

CASES RELIED UPON BY APPELLANT DO NOT SUSTAIN ALLEGED JURISDICTION OF SUPREME COURT OF UNITED STATE IN THIS CASE

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, was a case where a Kentucky Corporation was taxed under a Kentucky statute upon its rolling stock permanently located in other states and employed there in its business. It presented a question of state jurisdiction over

the property taxed. There can be no question in this case but that the earned income of both husband and wife was subject to Wisconsin Income Tax.

Williams v. Bruffy, 102 U. S. 248, simply states the undisputed rule that this Court may review the decision of a state Supreme Court, where a proper federal question is involved.

Western Union Tel. Co. v. Crovo, 220 U. S. 364, presented a Virginia statute which imposed a penalty upon telegraph companies which negligently failed to transit as promptly as practicable, messages received in Virginia for transmission to other states. This was held to be valid legislation in the absence of federal legislation on the subject.

Home Savings Bank v. Des Moines, 205 U. S. 503, involved an Iowa statute that directed that a tax upon the stock of state banks should be assessed to the banks and not the stockholders. This was held to violate the immunity of national securities from state taxation, for the effect of the statute was to adopt the value of the shares as the measure of the tax, without permitting deduction from such valuation of the bonds of the United States owned by the state banks. We cannot see how any similar question is here involved.

Corliss v. Bowers, 281 U. S. 376, arose under the federal Income tax law, and held that the grantor of a revocable trust in favor of grantor's wife, could be assessed for income tax even though such income was actually paid to the wife, and the grantor lost the power to appropriate it. The case involves no state legislation. It is important as a recent expression of the policy of the Court on income tax legislation, that, "*taxation is not so much concerned with refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax*

is paid." This clearly supports the law in the present case.

Wilcutts v. Bunn, (Decided Jan. 5, 1931.) 75 L. Ed. 155; No. 5 U. S. Sup. Ct. Adv. Opinion 155, involved the question of whether the Federal Income Tax law could tax profit derived from the sale of municipal bonds. It was held that they were subject to federal legislation and taxation in the absence of any showing that any appreciable burden was thereby cast upon the state's borrowing power. The case does not involve state legislation, and we are unable to see how it relates to the question presented in this case, in even the remotest degree.

We submit that examination of the authorities relied upon by appellant, do not support the jurisdiction of the Supreme Court of the United States in this cause. We also submit that the authorities cited in the first sections of this brief on jurisdiction, clearly show that such jurisdiction does not in fact exist in this case, and that there is no substantial federal question involved.

Dated March 14, 1931.

Respectfully submitted,

JOHN W. REYNOLDS,
Attorney General of Wisconsin,

HAROLD M. WILKIE,
Special Counsel for Respondent,
Tax Commission of Wisconsin.

APPELLEE'S BRIEF

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 17

Appeal from Supreme Court of Wisconsin

ALBERT A. HOEFER,

Appellant,

vs.

TAX COMMISSION OF WISCONSIN AND MARATHON COUNTY OF WISCONSIN,

Respondents.

BRIEF OF APPELLEE TAX COMMISSION OF WISCONSIN

JOHN W. REYNOLDS,
Attorney General of Wisconsin,

HAROLD M. WHITE,
Special Counsel for Wisconsin
State Tax Commission, Appellee.

OUTLINE OF BRIEF

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CASE APPEALED FROM

(Hoeper v. Tax Commission, 202 Wis. 498, 233 N. W. 100)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 714

Appeal from Supreme Court of Wisconsin

ALBERT A. HOEPER,

Appellant,

vs.

TAX COMMISSION OF WISCONSIN AND MARATHON COUNTY OF WISCONSIN,

Respondents.

BRIEF OF APPELLEE TAX COMMISSION OF WISCONSIN

STATEMENT OF CASE

The statement of facts by counsel for appellant (pp. 2–4 appellant's brief) is correct. It is conceded by appellant that the judgment below in no way takes into consideration any income of the wife before she became the wife of appellant but it is claimed that the tax paid by appellant under protest was $56.14 more than he would have been obliged to pay if his wife's income after marriage had been left out of the total amount of income on which the income tax payable by him was computed. Of Mrs. Hoeper's income, only $148.91 was from dividends and interest, $2400.00 was from salary for

services in an insurance agency in which she was a partner and $1519.52 was from distribution out of partnership profits in excess of such salary. (Tr. pp. 5–6)

The contention of counsel for appellant is that in Wisconsin by other legislative enactments the marriage relation has become a mere social relationship and that the husband has no *legal* right or interest in the income of his wife. (Appellant's Brief pp. 8–11, 17) It is then contended that classification for purposes of taxation must be based on "legal rights and duties" (p. 20) alone and it is further said "Pass beyond that and no other clear limitation can be found." (p. 20) Counsel gives the illustration of collateral relatives or strangers from whom a benefit in the support of the family may be expected but to which there is no legal right. (pp. 19–20)

We believe it to be well established that the modification of the incidents of the marriage relation lies peculiarly within the power of the legislature of the state and that the particular modification here involved presents no substantial federal question. This court has deferred the consideration of this question of jurisdiction until argument on the merits and we shall argue both propositions together. The only questions are (1) Is a substantial federal question presented, and (2) If so, is the basis of the tax here in question so plainly arbitrary and without substantial reason to support it as to invalidate it under the Fourteenth Amendment.

It is claimed by appellant that the amount of his wife's separate income (though she is living with her husband) cannot be used or relied on in any way to swell the amount he is called upon to contribute by way of income taxation. It is not claimed that her income is of such character that by either Federal Constitution or law it is exempted from state taxation and that therefore to use it in measuring the tax to him would indirectly be violating a Federal law exempting certain property from taxation (as for example United States Bonds).

ARGUMENT

THE STATUTES HERE IN QUESTION ARE (IN THE PROVISIONS CHALLENGED BY APPELLANTS) BASED ON BOTH PRACTICAL AND LEGAL DISTINCTIONS WHICH RENDER IT IMPOSSIBLE TO LOGICALLY HOLD THAT THESE PROVISIONS ARE PURELY ARBITRARY AND INVOLVE A CLASSIFICATION WITHOUT ANY REASONABLE GROUND THEREFOR.

(1) *Practical considerations upon which the legislature may well have relied are sufficient to sustain the law in question.*

In respect to the above mentioned contentions of the able counsel for appellant and the illustrations of strangers and collateral relatives to which he refers (as indicating the extent to which tax legislation might be carried if encouraged by a decision sustaining the law here involved) it might well seem sufficient to quote the language of Mr. Justice Holmes in *Noble State Bank vs. Haskell*, 219 U. S. 104 (upholding state bank guaranty law compelling all banks to submit to assessment to create fund to protect depositors of all banks as against the challenge that it violated the 14th Amendment):

> "In answering that question, we must be cautious about pressing the broad words of the 14th Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown easily enough, to transgress a scholastic interpretation of one or the other of the great guarantees in the Bill of Rights." (p. 110)
>
> * * *
>
> "It is asked whether the state could require all corporations or all grocers to help to guarantee each other's solvency and *where we are going to draw the line.* But the last is a futile question and we will answer the others when they arise. With regard to the police power as

elsewhere in the law, lines are pricked out by a gradual approach and contact of decisions on the opposing sides." (p. 112) (Italics ours)

Undoubtedly Mr. Justice Holmes had in mind when he said "as elsewhere in the law", the situation with respect to taxation where the same rules are applied.

In *State Board of Tax Commissioners vs. Jackson*, 75 L. Ed. 670 at 674, this court, by Mr. Justice Roberts, said (upholding Indiana chain store tax):

> "The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations."

And again in the same case it is stated:

> "Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the court make this abundantly clear."

In the above case the court stressed *not* any preexisting *legal* difference between large department stores and chain stores but practical differences which the legislature may have had in mind in respect to their relative earning capacity and advantages. (P. 675 of 75 L. Ed.)

Thus in the same opinion it is stated: (p. 673)

> "The record shows that the chain store has many features and advantages which definitely distinguish it from the individual store dealing in the same commodities. With respect to associations of individual stores for purposes of co-operative buying, exchange of ideas as to advertising, sales methods, etc., it need only be remarked that these are voluntary groups, and that series of inde-

pendent units cannot, in the nature of things, be as efficiently and successfully integrated as a chain under a single ownership and management."

The above would seem to indicate very plainly that the precise analysis of legal rights prior to and independently of this statute cannot (as claimed by appellant) be made a measure of the power of a state legislature to make distinctions in taxation. The above decision in the chain store case is much stronger than necessary to sustain our position here since here we have not only a practical distinction in respect to ability to pay and in the benefits derived from government by the family unit but also have the well established legal relationship of marriage which (though its incidents may be somewhat modified by other state legislation) is still a very definite legal relationship and one peculiarly subject to legislative control. In the chain store tax situation the members of this court divided on the question of whether there were any practical advantages in the chain store superior to those possessed by the large department store. No such room for difference of opinion exists, we think, in the present case. Those within the marriage relation and actually living together obviously form a "natural class" both from a practical and legal standpoint.

So also in the above case of *State Board of Tax Commissioners vs. Jackson*, 75 L. Ed. 670 at 674 we find it stated in the majority opinion:

> "The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded on a reasonable distinction (citation) or if any state of facts reasonably can be conceived to sustain it (citations)".

The state statute here in question permits the rate of tax and average income on which the tax is to be paid by the husband to be greater (by reason of his wife's income) than he otherwise would pay *only where the husband and wife are*

living together. (See Statute quoted p. 22 Appellant's Brief). If the wife were living apart, she would have a separate exemption, be assessed separately, and so would he and the rate would be somewhat lower. In such case, they would not be living in the same family establishment and the same reason would not exist for taxing him on the basis of greater ability to pay because of each spouse having an income. Greater ability to pay is of course a justification for requiring larger contributions by way of income taxation.

As stated in *Shaffer v. Carter*, 252 U. S. 37 at 51:

> "Income taxes are a recognized method of distributing the burdens of government, favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may readily be proportioned to their ability to pay."

It is true that Wisconsin has modified some of the common law incidents of the status of husband and wife. It has given the wife the right to her separate earnings and property, enlarged the right to sue and given her other privileges.

Wis. Stats. Sec. 246.07, 6.015 and other sections quoted at pp. 8–10 appellant's brief.

But these changes were within the legislative power to modify the relative duties and rights of husband and wife. The legislature can make more changes. The very law here under consideration fixes a certain changed legal consequence from the relation of marriage. The husband and wife in this case were married in 1927 (Tr. 16), long after all the legislation here involved (including all the statutes quoted by appellant at pages 8–10 appellant's brief) was adopted and fully appreciating that they were governed by any laws changing wholly or partially the respective rights of the parties at common law and fixing certain obligations and duties on husband and wife. In view of this right of the state legislature to modify the duties and responsibilities in the marriage relation we are

unable to see even the presence of a federal question in this case.

Moreover, if there were technically a federal question here, we think the right of the state legislature to use the presence of the marriage relation as a ground for classification is so clear as to preclude the view that there is a "substantial" federal question here.

This view is strengthened by the fact that more than twenty years ago these provisions of this law were sustained in the Supreme Court of Wisconsin *(Income Tax Cases*, 148 Wis. 456 at pp. 513–514) and that until now such decision has remained unchallenged; the provisions have been acquiesced in in practice. Such fact would seem to be strong evidence in itself of "some substantial" ground for the classification. The Supreme Court of Wisconsin then *(Income Tax Cases*, 148 Wis. 456 at 513–514) and now (202 Wis. 493; 233 N. W. 100) has considered the marriage relation as it exists under Wisconsin law ample ground for the classification here involved. Nor did this arise out of any lack of appreciation of the proper rule for it was stated in the *Income Tax Cases*, 148 Wis. 456 at 513–514 in respect to the very provisions here involved:

> "This is another case of classification, and it is only justifiable in case there is some substantial difference which suggests the advisability of difference of treatment."

The Wisconsin court said in the instant case:

> "The relation offers special advantages to those who are in the relation, and the concern of the government to secure and protect these advantages has contributed not only to the problems of government, but to the expenditures for which taxes are levied. Those in the relation form a well recognized social and economic unit, deriving benefits as such unit from the combined incomes of its members and in proportion to the size of this income." P. 102.

This court considered the married status in the case of *Maynard v. Hill*, 125 U. S. 190, saying:

> "Marriage as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, *the duties and obligations it creates, its effect upon the property rights both present and prospective*, and the acts which may constitute grounds for its dissolution." (Italics ours)

Practical considerations affecting ability to pay and affecting the amount which the head of a family ought to contribute and can contribute by way of taxation without jeopardizing the support of his family are surely at least as much for the consideration of the legislature and the court as the more technical considerations of strictly legal rights.

Whatever may be the situation as to strangers or collateral relatives, we all know that in fact the family burdens on a husband are greatly lightened by the possession and receipt of substantial income by his wife. The family unity is a fact which has not and probably cannot be changed by legislation. The relation in fact existing between husband and wife, with its practically universal accompaniment of assistance to each from the income of the other in the performance of the common family duties and in sustaining the common family burdens would seem in itself quite sufficient to acquit a legislature, in respect to legislation such as is here involved, of a charge of having passed a law making unfair and arbitrary discriminations without any reasonable basis therefor. But in addition to this, the husband still has very substantial legal rights in Wisconsin of pecuniary value in respect to the income and property of the wife.

(2) *Under Wisconsin laws the husband still has substantial pecuniary advantages from the property and income of the wife which are not possessed by other persons.*

Appellant's counsel quotes (p. 9 appellant's brief) *Section 6.015 Wisconsin Statutes* under which it was sought to place a wife on an equality with the husband under the law except in respect to protection and privileges under the law which she enjoys for the general welfare.

In *Wait v. Pierce*, 191 Wis. 202 at 211 the court said (as to this statute):

> "We all have more or less conscious ideals and cherished concepts relating to the unity of the family and the sanctity of the family relation. We regard with disfavor the gradual disappearance of these ideals in the community at large. As a matter of fact, however, the family relation is not disturbed by the enactment of statutes conferring rights upon married women. It is only when the ideal family relation has for some reason been disrupted that rights under the statute are asserted."

The Wisconsin Statutes provide that "The father, *mother*, husband, children, *and wife* of any poor person who is blind, old, lame, impotent or decrepit so as to be unable to maintain himself, shall relieve and maintain such poor person so far as they are able", and further that the county judge on notice shall "by order require relief and maintenance from such relatives * * * if living and of sufficient ability * * * in the following order: first the husband or wife; then the father; then the children; and lastly the mother."

Sec. 49.11 Wisconsin Statutes (Italics ours).

In cases of divorce, where the custody of the children is awarded to the husband "the court may adjudge to the husband out of the separate estate of the wife, such sums for the support and education of such minor children as it shall deem just and reasonable".

Sec. 247.27 Wisconsin Statutes.

As to judicial separation, it is specifically provided that: "the court may finally divide and distribute the estate, both real and personal of the husband and so much of the estate of the wife as shall have been derived from the husband between the parties, and divest and transfer the title of any thereof accordingly, having always due regard to the legal and equitable rights of each party, the ability of the husband, *the special estate of the wife*, the character and situation of the parties and all the circumstances of the case."

Sec. 247.26 Wisconsin Statutes (Italics ours).

The above results have been held to follow after the enactment of all the statutes to which counsel refers in his brief.

Steinbach v. Steinbach, 200 Wis. 208.

Voegli v. Voegli (Wis.), 236 N. W. 123.

Kalbakken v. Kalbakken, 199 Wis. 501.

While it is true, as stated by counsel, that a wife can legally disinherit her husband in Wisconsin, certainly such is not the usual result. Both the husband and children usually derive a very substantial benefit from the possession of separate property or income by the wife.

Under Wisconsin law the husband is still entitled to maintain an action for damages for injury to or death of the wife in which the damages are measured not only by the value of her services in the household but also by other earnings which have aided in the support of the family.

Herro v. Malleable Iron Company, 181 Wis. 198, 200.

(3) ***That in exceptional cases a husband may possibly derive no benefit from the income of his wife does not invalidate this law.***

Appellee does not concede that in the actual working out of the law any appreciable hardship will be occasioned. Surely there is none in this case. As the Wisconsin Supreme Court said in this case:

> "It is of course true that there may be some families in which the husband enjoys the benefit solely from his income, and the wife the benefit solely from hers. This, however, is not the usually contemplated result of the marriage, and the fact that the statute may seem to affect unfairly a few persons thus situated has no bearing upon the reasonableness of the classification." P. 102

In *Quong Wing v. Kirkendall*, 223 U. S. 59 this court said:

> "It (the state) may make discriminations if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary." P. 62

This court in *Metropolis Theatre Co. v. Chicago*, 228 U. S. 61 in commenting on the relation between price of admission and revenue says:

> "If it be so universal in the practice of the business, it would seem not unreasonable if it be adopted as the basis of governmental action." P. 69

So in the case of marriage; where the common situation is one of mutual financial benefit and interdependence, why should it not be a basis for classification? A court need not close its eyes to facts which everyone else knows.

The fact that there may be some hard cases under this or any other law is not sufficient reason for condemning it. If so, there would be few valid tax laws.

The same question comes up in connection with exemptions. If the legislature provided that a married man living with his wife who had a separate income of more than a certain amount should have no exemption or a lower exemption to be deducted in arriving at the net income subject to the rates, such provision would increase his tax as compared with that of a man whose wife had no separate income. But would anyone suggest that such a provision would be so unreasonable as to render the law invalid? The principle is the same as that involved in this case and the result would be the same in increasing the tax.

In the case of *Robertson v. Pratt*, 13 Hawaii 590 the court said:

> "It is impossible to attain absolute equality or uniformity in taxation. Approximate equality and uniformity is all that is required. The legislature may classify objects and provide different methods of estimating amounts or values. So long as it acts in good faith and on general lines and makes distinctions on some reasonable basis, the courts cannot interfere. The provisions in question seem to be in harmony with the general theory of the Act. *The Act seems to deal with units, whether corporate or private.* It treats as a unit all whether few or many, large or small, whose income or incomes on the one hand and expenses on the other hand are combined. Taxation laws must be practical. They cannot be Utopian. No two persons would agree as to just what a perfect tax should be. It is easy to raise objections, but the moment an attempt is made to obviate the objections by framing the law differently, new objections arise. If the one thousand dollar exemption were made to apply to each individual, there would doubtless be much greater inequality *in actual results* than is the case under the law as it stands, as will appear by a little reflection." (Italics ours)

At an early date, this court said in *Bells Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232 at 237:

> "We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the state to adopt an iron rule of equal taxation. If that were the proper construction, it would not only supersede all those constitutional provisions and laws of some of the states whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; *but it would render nugatory those discriminations which the best interests of society require.*" (Italics ours)

(4) *The fact that evasion of just income taxation (higher rates for higher incomes) would be easier if the incomes of husband and wife were not combined and tax assessed on this basis is a further consideration supporting this law.*

The law has recognized almost from time immemorial that the marriage relationship offers peculiar opportunities for evasion. This is shown by statutes regulating transfers between husband and wife, by decisions holding that transactions between them should be closely scrutinized, and by other similar laws and decisions. The Wisconsin Supreme Court said in this case:

> "The relation has always been recognized as offering peculiar opportunities for fraud and colorable transfers for the purpose of defeating creditors. It is clear that it also offers opportunities that do not exist to the same degree in the case of single persons, for shifts and transfers of property in order to secure greater exemptions from income taxes, and to avoid the higher brackets of such a tax." P. 102

But it is claimed that this ground for sustaining the statute here in question is removed by the decision in *Schlesinger v. Wisconsin*, 270 U. S. 228. That case involved the validity of a law providing that gifts made within six years of death should be *conclusively presumed* to be made in contemplation of death and thus to be subject to a *graduated inheritance tax*. It was found as a fact that the gifts in question were not made in contemplation of death. It was urged that the provision was necessary in order to prevent evasion of inheritance taxes. But it was held (Mr. Justice McReynolds writing the majority opinion) that this was not enough to save the validity of the law. It was pointed out in the majority opinion (pp. 239–240):

> "The court below declared that a tax on gifts inter vivos only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be "wholly arbitrary." We agree with this

view and are of opinion that such a classification would be in plain conflict with the 14th Amendment. The legislative action here challenged is no less arbitrary. Gifts inter vivos within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, while like gifts at other times are not thus treated. There is no adequate basis for this distinction. Secondly, they are subjected to graduated taxes which could not properly be laid on all gifts or, indeed, upon any gift without testamentary character."

Thus in above case, a situation was presented where the gift taxed could not as a gift *inter vivos* have been subjected at all to the graduated tax involved even if all gifts *inter vivos* were so subjected. And further all gifts *inter vivos* except those within six years of death were not taxed at all.

But in spite of those facts, there was a strong minority opinion written by Mr. Justice Holmes and in which Justice Brandeis and Mr. Justice Stone concurred in which it was said:

> "I am not prepared to say that if the legislature held that belief, it might not extend the tax to gifts made within six years of death in order to make sure that its policy of taxation should not be escaped. I think that with the states as with Congress when the means are not prohibited and are calculated to effect the object we ought not to inquire into the degree of the necessity for resorting to them."

Compare the situation in the Schlesinger case with that here. *Here the income of the wife can unquestionably be made the subject of a graduated tax just as that of the husband.* No presumption is resorted to to make her income a partial measure of the tax. She and her husband both could be taxed at a higher rate because they each had income and they had each less burden to bear because they were husband and wife and lived in the same household. The rate is higher but no subject matter is taxed which in a similar situation is

not taxed the same way. In the Schlesinger case of *inter vivos* gifts, only gifts within six years of death were taxed. Here the rule is absolutely the same as to every husband and wife living together and as to *all* their income. In every family the same rule applies as to *all* income. We therefore think this case is easily distinguishable from the Schlesinger case. And if it were not that case would only destroy *one* of the several grounds on which this statute should be sustained.

The Wisconsin Supreme Court in the present case said:

> "It may quite easily be admitted that an invalid tax may not be exacted of one person in order that a valid tax may be effectively collected from another without progressing at all towards the solution of this case. The very question in this case is whether the tax is invalid, and this depends upon whether a classification based on the marriage relation is wholly arbitrary and unreasonable in connection with the imposition of an income tax."

(5) *The case of Poe v. Sanborn, 75 L. Ed. 27 and other cases relied on by appellant are clearly distinguishable.*

The case of *Poe v. Sanborn*, 75 L. Ed. 27 held that husband and wife (residents of the State of Washington) were separately taxable on their respective parts of income of community property under the Federal Income Tax Law. It was held the Federal Law did not require the husband to pay a tax assessed to him on the whole. The case involved only the *construction* of the Federal law—not any question of validity. The court said:

> "This case requires us to construe sections 210(a) and 211(a) of the Revenue Act of 1926 and apply them as construed to the interests of husband and wife in community property under the law of Washington. These sections levy a tax on *the net income of every individual.* The act goes no farther, and furnishes no other standard or definition of what constitutes an individual's income." (Italics ours)

The cases of *Corliss v. Bowers*, 281 U. S. 376, *U. S. v. Robbins*, 269 U. S. 315, and *Old Colony Trust Co. v. Comm.*, 279

U. S. 716, also involved the Federal income tax law, which attempts no classification based on marriage. They can have no hearing here. The Corliss Case, however, does contain this significant statement:

> "But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid." P. 377.

The case of *Lucas v. Earl*, 50 S. Ct. 241 may be dismissed from consideration with the statement that it, too, merely involves the construction of the Federal Income Tax Act, as appears from the following excerpt from the opinion:

> "But this case is not to be decided by attenuated subleties. It turns on the import and reasonable construction of the taxing act."

We are not, of course, concerned with the question of the possible validity of a Federal Law similar to the one here in question. The state legislature has ample power to modify the incidents of the marriage relation—a power not possessed by Congress. In the present case the law is not only sustainable as a law imposing a fair tax in accordance with real ability to pay and in accordance with the protection afforded by the state to the family unit and provided for in such manner as to discourage evasion, but it may also be sustained as a legislative modification of the duties of the husband by the legislature having the power so to provide.

We respectfully submit that the judgment of the Supreme Court of Wisconsin should be affirmed.

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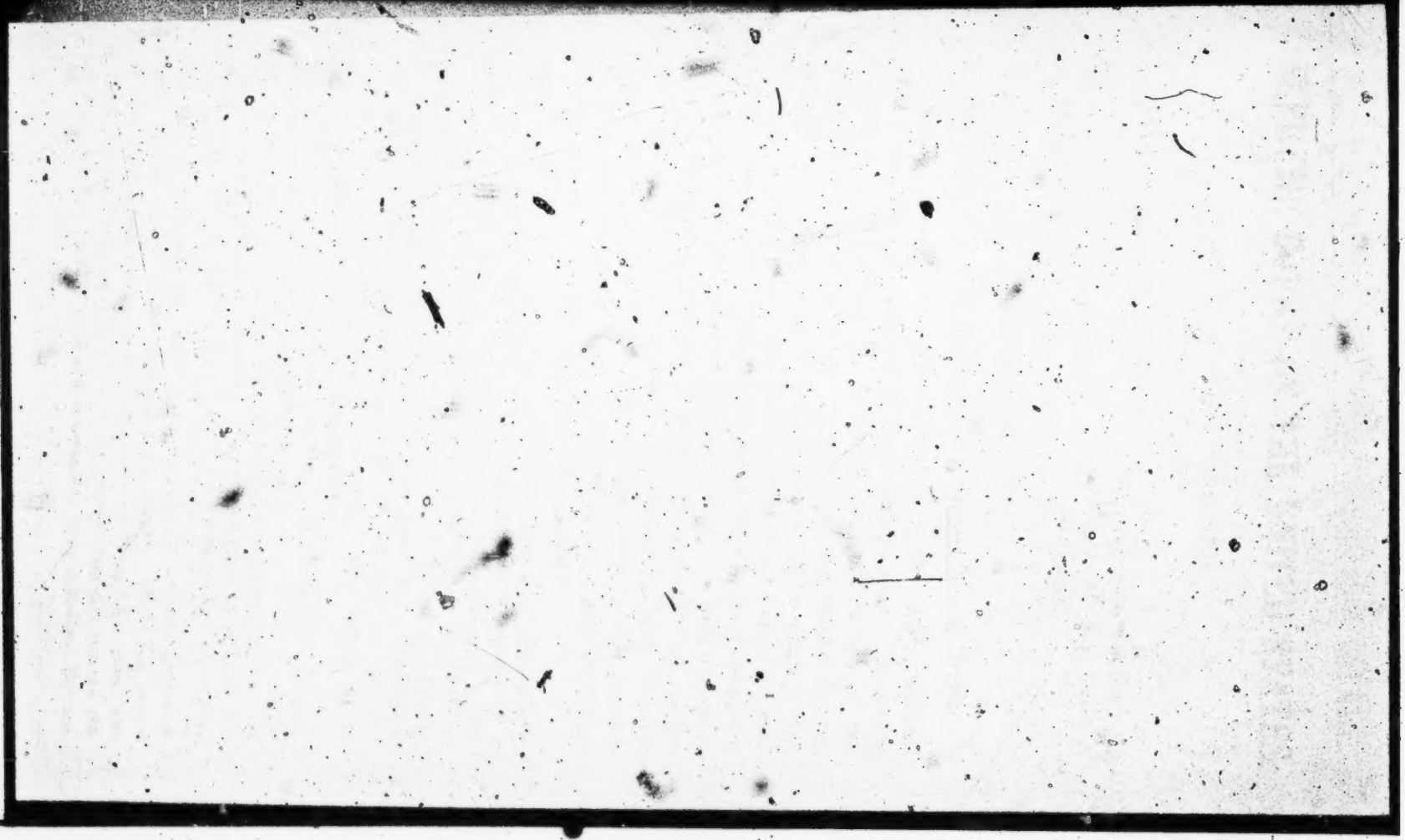

SUPREME COURT OF THE UNITED STATES.

No. 17.—October Term, 1931.

Albert A. Hoeper, Appellant,
vs.
Tax Commission of Wisconsin, and Marathon County, Wisconsin.

Appeal from the Supreme Court of the State of Wisconsin.

[November 30, 1931.]

Mr. Justice Roberts delivered the opinion of the Court.

Appellant, a resident of Marathon County, Wisconsin, married in the year 1927. Subsequent to his marriage he was in receipt of income taxable to him under the income tax statute of the state. His wife, during the same period, received taxable income, composed of a salary, interest and dividends, and a share of the profits of a partnership with which her husband had no connection. The assessor of incomes assessed against the appellant a tax computed on the combined total of his and his wife's incomes as shown by separate returns, treating the aggregate as his income. The amount so ascertained and assessed exceeded the sum of the taxes which would have been due had their taxable incomes been separately assessed.[1] The authority for the assessor's procedure is found in the following sections of the act:

Sec. 71.05 (2) (d): ". . . In computing taxes and the amount of taxes payable by persons residing together as members of a family, the income of the wife and the income of each child under eighteen years of age shall be added to that of the husband or father, or if he be not living, to that of the head of the family and assessed to him except as hereinafter provided. The taxes levied shall be payable by such husband or head of the family, but if not paid by him may be enforced against any person whose income is included within the tax computation."

Sec. 71.09 (4) (c): "Married persons living together as husband and wife may make separate returns or join in a single joint return. In either case the tax shall be computed on the combined average taxable income. The exemptions provided for in subsection (2) of section 71.05 shall be allowed but once and

[1] This resulted from the fact that the act provides for surtaxes graduated according to the amount of the taxpayer's net income. While the excess would have been less if returns and assessments had been made under section 71.09 (4) the total would still have been greater than the sum of the husband's and wife's taxes if separately assessed on their individual incomes.

divided equally and the amount of tax due shall be paid by each in the proportion that the average income of each bears to the combined average income."

Appellant paid the tax under protest, and after complying with requisite conditions precedent, instituted proceedings to recover so much thereof as was in excess of the tax computed on his own separate income. He asserted that the statute as applied to him violates the Fourteenth Amendment. The Supreme Court of Wisconsin overruled this contention and affirmed a judgment for appellees. The question is whether the state law as interpreted and applied deprives the taxpayer of due process and of the equal protection of the law. The appellant says that what the state has done is to assess and collect from him a tax based in part upon the income received by his wife and that such exaction is arbitrary and discriminatory, and consequently violative of the Constitutional guaranties.

At common law the wife's property, owned at the date of marriage or in any manner acquired thereafter, is the property of her husband. Her earnings and income are his, he may dispose of them at will, and he is liable for her debts. Were the status of a married woman in Wisconsin that which she had at common law, the statutory attribution of her income to her husband for income tax would, no doubt, be justifiable. But her spouse's ownership and control of her property have been abolished by the laws of the state. Women are declared to have the same rights as men in the exercise of suffrage, freedom of contract, choice of residence for voting purposes, jury service, holding office, holding and conveying property, care and custody of children, and in all other respects.[2] Under the title "Property Rights of Married Women" it is enacted that a wife's real estate and its rents, issues and profits shall be her sole and separate property as if she were unmarried, and shall not be subject to the disposal of her husband;[3] and this is true of her personal property as well, whether owned at the date of marriage or subsequently acquired.[4] She may convey, devise or bequeath her property, real and personal, as if she were unmarried, and her husband has no right of disposal thereof, nor is it liable for his debts.[5] Either spouse may convey his or her

[2] Wis. Stats. 1929, § 6.015 (1).
[3] *Ibid.* § 246.01.
[4] Wis. Stats. 1929, § 246.02.
[5] *Ibid.* § 246.03

property to the other or create a lien thereon in favor of the other.[6] The individual earnings of every married woman, except those accruing from labor performed for her husband, or in his employ or payable by him, are her separate property, and are not subject to his control or liable for his debts.[7] She may sue in her own name and have all the remedies of an unmarried woman in regard to her separate property or business and to recover her earnings, and is liable to suit and to the rendition of a judgment, which may be enforced against her separate property as if she were unmarried.[8]

Since, then, in law and in fact, the wife's income is in the fullest degree her separate property and in no sense that of her husband, the question presented is whether the state has power by an income tax law to measure his tax, not by his own income but, in part, by that of another. To the problem thus stated, what was said in *Knowlton* v. *Moore*, 178 U. S. 41, 77, is apposite:

"It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income. (Compare *Nichols* v. *Coolidge*, 274 U. S. 531, 540.)

It is incorrect to say that the provision of the Wisconsin income tax statute retains or reestablishes what was formerly an incident of the marriage relation. Wisconsin has not made the property of the wife that of her husband nor has it made the income from her property the income of her husband. Nor has it established joint ownership. The effort to tax B for A's property or income does not make B the owner of that property or

[6] *Ibid.* § 246.03.
[7] *Ibid.* § 246.05.
[8] *Ibid.* § 246.07.

income, and whether the state has power to effect such a change of ownership in a particular case is wholly irrelevant when no such effort has been made. Under the law of Wisconsin the income of the wife does not at any moment or to any extent become the property of the husband. He never has any title to it, or controls any part of it. That income remains hers until the tax is paid, and what is left continues to be hers after that payment. The state merely levies a tax upon it. What Wisconsin has done is to tax as a joint income that which under its law is owned separately and thus to secure a higher tax than would be the sum of the taxes on the separate incomes.

The court below assigned two reasons which it thought removed the Constitutional objections to the application of the statute in the instant case. It cited and followed the *Income Tax Cases*, 148 Wis. 456, where the statute here in question was sustained on the ground that the provisions under attack are necessary to prevent frauds and evasions of the tax by married persons, and stated that the decision of this Court in *Schlesinger* v. *Wisconsin*, 270 U. S. 230, was not inconsistent with the views expressed by the Supreme Court of Wisconsin in its earlier decision. To this we cannot agree. In the *Schlesinger* case this Court held invalid a statute which, for purposes of inheritance tax, classified all gifts *inter vivos*, effective within six years of death, as gifts made in contemplation of death. To the argument of the necessity for such classification to prevent frauds and evasions, it was answered:

"That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B'. Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

The claimed necessity cannot justify the otherwise unconstitutional exaction.

The second reason assigned as a justification for the imposition of the tax is that it is a regulation of marriage. It is said that the marital relation has always been a matter of concern to the state, and has properly been the subject of legislation which classified it as a distinct subject of regulation. It is suggested that a difference of treatment of married as compared with single persons in the amount of tax imposed may be due to the greater and different privileges enjoyed by the former, and, if so, the discrimination

would have a reasonable basis, and constitute permissible classification. This view overlooks several important considerations. In the first place, as is pointed out above, the state has, except in its purely social aspects, taken from the marriage status all the elements which differentiate it from that of the single person. In property, business and economic relations they are the same. It can hardly be claimed that a mere difference in social relations so alters the taxable status of one receiving income as to justify a different measure for the tax.

Again, it is clear that the law is a revenue measure, and not one imposing regulatory taxes. It levies a tax on "every person residing within the state" and defines the word "person" as including "natural persons, fiduciaries and corporations", and "corporations" as including "corporations, joint stock companies, associations or common law trusts." It lays graduated taxes on the incomes of natural persons and corporations at different rates. It is comprehensive in its provisions regarding gross income and allowable deductions and exemptions, and is in most respects the analogue of the federal income tax acts in force since 1916. It is obvious that the act does not purport to regulate the status or relationships of any person, natural or artificial. Arbitrary and discriminatory provisions contained in it cannot be justified by calling them special regulations of the persons or relationships which are the object of the discrimination. The present case does not fall within the principle that where the legislature, in prohibiting a traffic or transaction as being against the policy of the state, makes a classification, reasonable in itself, its power so to do is not to be denied simply because some innocent article comes within the proscribed class. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 204. Taxing one person for the property of another is a different matter. There is no room for the suggestion that *qua* the appellant and those similarly situated the act is a reasonable regulation, rather than a tax law.

Neither of the reasons advanced in support of the validity of the statute as applied to the appellant justifies the resulting discrimination. The exaction is arbitrary and is a denial of due process.

The judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

SUPREME COURT OF THE UNITED STATES.

No. 17.—October Term, 1931.

Albert A. Hoeper,
vs.
Tax Commission of Wisconsin and Marathon County, Wisconsin.

Appeal from the Supreme Court of the State of Wisconsin.

[November 30, 1931.]

Mr. Justice Holmes.

This is an appeal from a judgment of the Supreme Court of Wisconsin sustaining the constitutionality of a tax levied under the laws of the State. The appellant married a widow. Both parties had separate incomes, and made separate returns. A tax was assessed upon the appellant for the total of both, as if both belonged to him. By R. S. Wisc. § 71.05 (2) (d), "In computing taxes and the amount of taxes payable by persons residing together as members of a family, the income of the wife and the income of each child under eighteen years of age shall be added to that of the husband or father, or if he be not living, to that of the head of the family and assessed to him except as hereinafter provided. The taxes levied shall be payable by such husband or head of the family, but if not paid by him may be enforced against any person whose income is included within the tax computation." By R. S. § 71.09 (4) (c), "Married persons living together as husband and wife may make separate returns or join in a single joint return. In either case the tax shall be computed on the combined average taxable income. The exemptions provided for in subsection (2) of section 71.05 shall be allowed but once and divided equally and the amount of tax due shall be paid by each in the proportion that the average income of each bears to the combined average income." The result of adding the incomes was to increase the rate of the plaintiff's income tax and to charge him with a portion of the tax otherwise payable by Mrs. Hoeper. He sets up the Fourteenth Amendment and says that he has been deprived of due process of law.

This case cannot be disposed of as an attempt to take one person's property to pay another person's debts. The statutes are the outcome of a thousand years of history. They must be viewed against the background of the earlier rules that husband and wife are one, and that one the husband; and that as the husband took the wife's chattels he was liable for her debts. They form a system with echoes of different moments none of which is entitled to prevail over the other. The emphasis in other sections on separation of interests cannot make us deaf to the assumption in the sections quoted of community when two spouses live together and when usually each would get the benefit of the income of each without inquiry into the source. So far as the Constitution of the United States is concerned the legislature has power to determine what the consequences of marriage shall be, and as it may provide that the husband shall or shall not have certain rights in his wife's property and shall or shall not be liable for his wife's debts it may enact that he shall be liable for taxes on an income that in every probability will make his life easier and help to pay his bills. Taxation may consider not only command over but actual enjoyment of the property taxed. See *Corliss* v. *Bowers*, 281 U. S. 376, 378. In some States if not in all, the husband became the owner of the wife's chattels on marriage without any trouble from the Constitution and it would require ingenious argument to show that there might not be a return to the law as it was in 1800. It is all a matter of statute. But for statute the income taxed would belong to the husband and there would be no question about it.

I will add a few words that seem to me superfluous. It is said that Wisconsin has taken away the former characteristics of the marriage state. But it has said in so many words that it keeps this one. And when the legislature clearly indicates that it means to accomplish a certain result within its power to accomplish it is our business to supply any formula that the *elegantiæ juris* may seem to require. *Sexton* v. *Kessler*, 225 U. S. 90, 97.

The statute is justified also by its tendency to prevent tax evasion. No doubt, if, as was held in *Schlesinger* v. *Wisconsin*, 270 U. S. 230, with regard to the measure then before the Court, there was no reasonable relation between the law and the evil, the

statute could not be upheld. But the fact that it might reach innocent people does not condemn it. It has been decided too often to be open to question that administrative necessity may justify the inclusion of innocent objects or transactions within a prohibited class. *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192, 201, 204. *Ruppert* v. *Caffey*, 251 U. S. 264, 283. *Hebe Co.* v. *Shaw*, 248 U. S. 297, 303. *Pierce Oil Corporation* v. *Hope*, 248 U. S. 498, 500. *Euclid* v. *Ambler Co.*, 272 U. S. 365, 388, 389. *Tyler* v. *United States*, 281 U. S. 497, 505. *Milliken* v. *United States*, 283 U. S. 15, 20.

Mr. Justice BRANDEIS and Mr. Justice STONE, concur in this opinion.